Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

FLORIDA SEED COMPANY, INC., *et al.*,
Petitioners,

v.

MONSANTO COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES M. CROOK
JOHN F. MANDT *
PHILLIP A. NICHOLS
BALCH & BINGHAM LLP
P.O. Box 306
Birmingham, Alabama 35201
(205) 251-8100
Counsel for Petitioners Florida Seed Company, Inc. and Frit Industries, Inc.

* Counsel of Record

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QUESTION PRESENTED

Does a distributor terminated by its supplier have antitrust standing where the distributor has alleged a refusal to deal having a collateral anticompetitive purpose to monopolize the relevant market, and where the supplier's refusal to deal follows its acquisition and temporary control of a competing brand?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the United States Court of Appeals for the Eleventh Circuit and herein include the following:

Petitioners

Florida Seed Company, Inc.
Frit Industries, Inc.

Respondent

Monsanto Company

RULE 29.6 DISCLOSURE

Petitioners are wholly-owned subsidiaries of Frit, Inc.

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PETITION FOR WRIT OF CERTIORARI

Florida Seed Company, Inc. ("Florida Seed") and Frit Industries, Inc. ("Frit") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The February 18, 1997 opinion of the court of appeals (App. A) is reported at 105 F.3d 1372. The November 9, 1995 Memorandum Opinion and Order of the court of original jurisdiction, the United States District Court for the Middle District of Alabama, Northern Division (App. B), is reported at 915 F. Supp. 1167.

JURISDICTION

The court of appeals rendered its decision on February 18, 1997. Rehearing on the February 18, 1997 judgment

was denied on April 24, 1997. (App. C). On May 7, 1997, the court of appeals issued its mandate. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2 (App. D).

Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a) (App. E).

STATEMENT OF THE CASE

1. *Factual Background:* This case presents a situation in which a manufacturer—Monsanto Company ("Monsanto")—with market power in the market for residential non-selective herbicides (weed killers) attained temporary control over a competing brand of its primary competitor and used that control in order to further monopolization and attempted monopolization of the relevant market. It was during this period of simultaneous control over competing brands that Monsanto terminated Florida Seed as a distributor of the temporarily controlled brand in order to effectuate Monsanto's plan to monopolize the relevant market.

According to Petitioners' complaint (the "Complaint"),[1] a critical step in Monsanto's scheme involved the manipulation of lawn and garden product distribution channels by terminating the long-standing distribution rights of Florida Seed and other distributors like Florida Seed. R1-1-19.[2] Monsanto targeted Florida Seed for elimination—not because it was a weak or ineffective distributor, but because it was a strong and effective distributor of the products Monsanto desired to cripple. R1-1-17.

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[1] For purposes of reviewing the Rule 12(b)(6) dismissal of Petitioners' antitrust claim, the factual allegations of the Complaint must be taken as true. *Albright v. Oliver*, 510 U.S. 1215 (1994).

[2] "R" refers to the record maintained by the clerk of the district court.

Florida Seed is engaged in the marketing and wholesale distribution of lawn and garden products. R1-1-1. Frit engages in the development and manufacture of certain lawn and garden products. R1-1-2. Frit is also the guarantor of certain debt allegedly owed to Monsanto from Florida Seed, which debt was the subject of a counterclaim by Monsanto in the court below. R1-1-16.

The termination of Florida Seed's distributorship followed the 1993 acquisition by Monsanto of the Ortho Consumer Products Division of Chevron Corporation ("Ortho"). R1-1-14. Both before and after that acquisition, Monsanto manufactured and sold a diversified line of chemicals, including agricultural chemicals. R1-1-2. Perhaps the best known of these chemicals is the leading residential non-selective herbicide known as "Roundup." R1-1-3.

Monsanto maintains market power in the relevant market. Among other claims, the Complaint in this action charges that Monsanto terminated Florida Seed's distributorship as a crucial step in a pattern of conduct constituting monopolization and attempted monopolization of the relevant market in violation of Section 2 of the Sherman Act. R1-1-18, 19. According to the Complaint, the relevant product market is the residential non-selective herbicide market, which includes "the manufacturing and formulation of non-selective herbicides as well as the *marketing* and *selling* of non-selective herbicide products for residential use in the control of brush, plants, weeds and grass." R1-1-2, 3. The Complaint identified the geographic market as the United States. R1-1-3. Monsanto's Roundup product was and is the dominant residential non-selective herbicide sold in the United States. R1-1-4.

Until the consummation of Monsanto's purchase of the Ortho assets in 1993, Ortho independently produced a residential non-selective herbicide ("Kleenup") that competed directly with Roundup. R1-1-3. Together, Mon-

santo's Roundup and Ortho's Kleenup comprised 85% of the relevant market for residential non-selective herbicides immediately prior to Monsanto's acquisition of Ortho in 1993. R1-1-4. Prior to the acquisition, Roundup enjoyed approximately 63% of the market and Kleenup enjoyed approximately 22% according to the Federal Trade Commission ("FTC"). R1-1-4. Barriers to entry into the highly concentrated residential non-selective herbicide market include high capital costs of product development, high marketing costs required to combat the market strength and brand identity of existing products, and Monsanto's patent protection over glyphosate, the key ingredient in both Roundup and Kleenup. R1-1-3, 4.

Monsanto's acquisition of Ortho's assets raised suspicions of the FTC, which required divestiture of the Kleenup Assets. Monsanto acquired the assets of Ortho in May, 1993, but only after the entry of a consent decree ("Consent Decree") settling charges filed by the FTC alleging that the acquisition would (i) substantially lessen competition or tend to create a monopoly in the residential non-selective herbicide market, (ii) increase Monsanto's ability unilaterally to exercise market power in that market, (iii) increase the already high concentration in the market, (iv) raise barriers to entry into the market and (v) eliminate Ortho as an independent competitive force in the market. R1-1-7. The Consent Decree required, among other things, that Monsanto divest itself of certain assets acquired from Ortho relating to the Kleenup product. R1-1-7. The Consent Decree gave Monsanto until September 30, 1994 to sell the following assets: [3] (i) the chemical formulation for Kleenup, (ii)

[3] As noted by the district court, Monsanto had not divested the Kleenup Assets at the time the Petitioners filed their Complaint in this case. The FTC approved the divestiture of the Kleenup Assets to Platte Chemical Company ("Platte") in September of 1994. R1-25-6. The record is otherwise silent concerning the background and capabilities of Platte or the results of its efforts to market Kleenup following divestiture. Nonetheless, Petitioners expect that,

the Kleenup product name trademark and (iii) a specified quantity of Ortho's glyphosate inventory (the "Kleenup Assets"). R1-1-7. The Consent Decree also required Monsanto to maintain the marketability and viability of the Kleenup Assets until such time as the divestiture was complete. R1-1-7.

Monsanto terminated Florida Seed as a distributor of a product over which Monsanto had only temporary control. For many years before Monsanto acquired the assets of Ortho, Florida Seed served as a distributor for the lawn and garden products of both Monsanto and Ortho, including Roundup and Kleenup. R1-1-10. Florida Seed operated as a Monsanto distributor pursuant to a series of Lawn and Garden Products Distributor Agreements, which were, by course of dealing, renewed annually until 1992. R1-1-10. By letter dated July 1, 1992, Monsanto informed Florida Seed of its intention to end their business relationship effective as of September 30, 1992. R1-1-13. Based on the correspondence received by Florida Seed from Monsanto, the decision to end Florida Seed's distributorship of Roundup and other Monsanto products was not based on Florida Seed's performance but on a "strategic decision" to use fewer authorized distributors. R1-1-13. Florida Seed urged Monsanto to reconsider this decision but took no legal action on account of it.

Florida Seed also served as an Ortho distributor for many years pursuant to a series of Wholesale Distributor Agreements between the two parties. R1-1-10. The parties to these Ortho distribution agreements renewed them annually by course of dealing, often not actually executing a contract until several months into a new annual period,

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with the benefit of discovery, they will be able to demonstrate that Platte has been dramatically less successful than Ortho had been in selling Kleenup in the residential lawn and garden products marketplace—largely because they lack effective product distribution channels in that marketplace.

and, in some instances, not executing a new contract at all. R1-1-10, 11. A few months before the purchase of Ortho's assets by Monsanto, Ortho completed phase one of what it termed its "Distributor Rationalization Program," which involved an assessment of each of its distributors' strategic direction, long-term financial stability, and relationships with Ortho and major retailers. R1-1-13, 14. Ortho later announced that it would enter the distribution level of the market by making direct sales to certain large retail chains. Thereafter, Ortho maintained a system of dual distribution. R1-1-14. As a result of this program, Ortho eliminated approximately thirty of its distributors during 1992 and early 1993, but retained Florida Seed. R1-1-14. Because Ortho and, subsequently, Monsanto were involved in both manufacturing and distribution, Florida Seed was both a customer and competitor of these entities.

As a result of Monsanto's acquisition of the Ortho assets and during the interim period Monsanto was given to divest the Kleenup Assets, Monsanto absolutely controlled the interbrand competition between Roundup and Kleenup. R1-16-4. By virtue of Monsanto's prior termination of Florida Seed's rights to distribute Monsanto's brand of products, including Roundup, Florida Seed had only one residential non-selective herbicide to sell—Ortho's Kleenup. R1-1-17. It was during the period of time in which Monsanto controlled both Roundup and Kleenup that Monsanto terminated Florida Seed as a distributor of Ortho products, including Kleenup, with an effective date of September 30, 1993. R1-1-15.

In the monopolization and attempted monopolization count of the Complaint, Petitioners alleged that as an integral part of a pattern of conduct calculated to preserve its market dominance, the defendant "embarked on a campaign to diminish the value of the Kleenup Assets required to be sold under the FTC consent order." R1-1-18, 19. The Complaint specifically alleged that Monsanto manipulated both the promotion of Roundup in

relation to Kleenup and "the distribution channels for Kleenup, to assure that the Kleenup product [lost] market share during the period of transition contemplated by the FTC order." R1-1-19. The Complaint further alleged that (i) Monsanto abruptly altered long-standing distribution patterns by terminating Florida Seed, (ii) Monsanto's claimed "strategic decision to use fewer distributors" was merely "pretextual," (iii) Monsanto terminated Florida Seed because Florida Seed was an effective and capable distributor of Kleenup at a time when promotion of Kleenup was at odds with Monsanto's intention to "cripple Kleenup," and (iv) that other Kleenup-only distributors were likewise terminated by Monsanto during this same time period. R1-1-17, 18, 19.[4]

2. *Proceedings Below:* On May 2, 1994, Petitioners commenced this action against Monsanto in the United States District Court for the Middle District of Alabama, Northern Division. R1-1. The Complaint asserted violations of Section 2 of the Sherman Act and other federal antitrust laws, as well as various state law claims. Monsanto filed a rule 12(b)(6) motion to dismiss all of Petitioners' federal antitrust claims on the sole ground that Petitioners lacked standing to assert those claims. R1-5. Florida Seed attempted to initiate discovery in the district court but never succeeded in obtaining production of documents or depositions in support of its antitrust claims. Eventually, Florida Seed's motion to compel was dismissed as moot and discovery was stayed. Thus, the

[4] The decision below leaves the mistaken impression that Florida Seed raised these antitrust claims only after Monsanto demanded payment on disputed commercial accounts. (8a). Although the point should be irrelevant to the standing issue in any event because it goes to the substance of the claim rather than the search for the proper plaintiff, the antitrust concerns of Florida Seed *were* expressed to Monsanto long before the disputed accounts arose. If the facts had been developed below, they would have shown that Florida Seed first raised its antitrust concerns in an August 20, 1993 letter —several months before the accounts receivable arose and many months before Monsanto demanded payment.

record before the district court essentially was limited to the text of the Complaint.

On November 9, 1995, the district court issued a memorandum opinion and order granting Monsanto's motion to dismiss the federal antitrust claims under Section 2 of the Sherman Act and Section 7 of the Clayton Act. (App. B). On January 17, 1996, the district court entered a final judgment granting Monsanto's motion to dismiss Petitioners' federal antitrust claims. R1-30. Petitioners timely filed a notice of appeal from the district court's order granting the defendant's motion to dismiss. R1-31. On February 18, 1997, the United States Court of Appeals for the Eleventh Circuit issued an opinion affirming dismissal of Petitioners' antitrust claims. (App. A). On March 11, 1997, Petitioners filed a Petition for Rehearing and Suggestion of Rehearing *En Banc*, which was denied on April 24, 1997. (App. C).

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S OPINION CONTRAVENES SUPREME COURT PRECEDENT.

The Eleventh Circuit opinion improperly creates a black-letter rule of antitrust standing. The Eleventh Circuit's decision erroneously creates a black-letter rule denying antitrust standing for distributor terminations—even where those terminations are part of a deliberately anticompetitive scheme by a firm with monopoly power—so long as the termination follows a merger or acquisition by the supplier. (6a) ("distributors who are terminated following a merger suffer no antitrust injury"). This Court's precedents have long recognized that although a manufacturer generally may deal with whom it pleases, it may not refuse to deal where it has a collateral anticompetitive purpose to create or maintain a monopoly. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 624 (1953) ("If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or

market control, even individual sellers' refusals to deal have transgressed the [Sherman] Act."). *See also, Lorain Journal v. United States*, 342 U.S. 143, 155 (1951) (right of individual seller to refuse to deal not absolute). This line of authority has its roots in *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

Aside from contravening this well-established authority, the rule announced by the Eleventh Circuit in this case would represent bad policy by granting *carte blanche* for suppliers with market power to disrupt distribution channels for anticompetitive reasons. This Court has expressly cautioned against using such inflexible rules to decide questions of antitrust standing. *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 536 n.33 (1983) (directing courts to "analyze each situation in light of the factors set forth in [that case]"). Indeed, the Eleventh Circuit's use of an inflexible standard in this case directly contradicts this Court's admonition in *Associated General* that a black-letter rule of antitrust standing is "virtually impossible" to develop. *Id.* at 536.

The Eleventh Circuit's opinion improperly limits the broad objectives of the antitrust laws. This Court has steadfastly "refused to engraft artificial limitations on the [Clayton Act] § 4 remedy," *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982), and has recognized that those remedial provisions serve both to deter antitrust violators and to provide remedies for those victimized by antitrust violations. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977). The Court further has cautioned against narrow interpretations that will limit these broad objectives. *McCready*, 457 U.S. at 477. The Eleventh Circuit's opinion in this case creates an artificial limitation on antitrust remedies that would limit the broad objectives of the antitrust laws by holding that distributors who are terminated following a merger or acquisition necessarily lack antitrust standing whether or not their termination results from unlawful anticompetitive conduct.

The Eleventh Circuit also engrafted artificial limitations on the Clayton Act Section 4 remedy, in effect requiring that Florida Seed complain of higher prices. (6a). Such a requirement is not found in relevant jurisprudence. Instead of narrowing its focus on whether Florida Seed complained of higher prices, the court should have considered whether Florida Seed's interests are aligned with those of the ultimate consumer. Perhaps the Eleventh Circuit's difficulty with this point stems from its failure to recognize that Petitioners' interests are aligned with those of the ultimate consumer and, indeed, that Florida Seed itself was a consumer.

The Eleventh Circuit's requirement that a party alleging monopolization must complain of higher prices contradicts the clear intent of this Court in *McCready*. *See* 457 U.S. at 482-83 (price is not the only form of remedial injury). The Eleventh Circuit's standard also fails to take account of the antitrust laws' deterrent effect in addition to their remedial effect. *Illinois Brick*, 431 U.S. at 746. Furthermore, such a narrow rule would undermine other established Supreme Court decisions such as *Pfizer Inc. v. India*, 434 U.S. 308 (1978) (foreign state could bring a treble damage action in a U.S. court because "[t]reble-damages suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers"). Based upon the Eleventh Circuit's rationale, *Pfizer* was wrongly decided because a suit by a foreign state could not have made ultimate consumers in the United States whole from the damages they suffered through paying higher prices. In many instances, a distributor's interests may be aligned with, and closely resemble, those of the ultimate consumer. *See Illinois Brick*, 431 U.S. at 740-41 ("in suits by direct purchasers or middlemen, the interests of ultimate consumers are similarly implicated"). In like manner, the interests of Florida Seed are aligned with those of ultimate consumers: Florida Seed's distribution of Kleenup promoted

competition by serving as a competitive counterweight to Roundup, and the weakening of that counterweight disserved the interests of consumers.

Florida Seed's injuries amounted to antitrust injuries because they were the type injuries that Monsanto's antitrust violations likely would cause. McCready is particularly instructive in the present situation, for the Court there determined that the harm to McCready, like that to Florida Seed, "was a necessary step in effecting the ends of the alleged illegal conspiracy." *Id.* at 479. As in *McCready,* the harm to Florida Seed was both necessarily foreseeable and inextricably intertwined with the lessening of competition brought about by Monsanto. Monsanto terminated Florida Seed to weaken the Kleenup brand, and to assure that competition in the market for residential non-selective herbicides would be dampened even after Monsanto divested itself of the Kleenup Assets. If the authority of *McCready* still stands, then Florida Seed's allegations that it was injured as a necessary step in effecting illegal monopolization must state valid antitrust injuries.

The claim before the Eleventh Circuit was based on a refusal to deal or market exclusion by Monsanto. As noted by this Court, "damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 125 (1969) (allegations of plaintiff's decreased market share reflected "precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause"). Like Zenith, Florida Seed suffered the types of loss that such anticompetitive activities likely would cause—the decline in sales and profits—and these losses arose directly from the weakening of competition in the relevant market.

The Eleventh Circuit's determination that Petitioners are "not complaining about higher prices," (6a), misses

the mark and is squarely at odds with established Supreme Court precedent. "[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise or to exclude competition when it is desired to do so." *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946). Petitioners asserted in their Complaint that "[a]t all times relevant to this action, Monsanto has . . . possessed the power to control price and exclude competition in the relevant market." R1-1-10. If the Kleenup brand has been weakened through selective curtailment of Kleenup's distribution channels, Monsanto's ability to obtain supracompetitive pricing for Roundup has been enhanced. This enhancement of market power has occurred at the expense of Florida Seed, and exclusion of Florida Seed from the market was the means by which Monsanto's control over the market was strengthened.

The Eleventh Circuit's decision in this case also conflicts with this Court's rationale in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 n.14 (1977) (plaintiffs need not "prove an actual lessening of competition in order to recover"). The petitioners in *McCready* misread this Court's opinion in *Brunswick* and the Eleventh Circuit did likewise in this case. While the petitioners in *McCready* argued that McCready's injury " 'did not reflect the anticompetitive effect' of the alleged violation," 457 U.S. at 482, this Court held that "Brunswick is not so limiting." *Id.* In so holding, this Court recognized that "a [Clayton Act] § 4 plaintiff need not 'prove an actual lessening of competition in order to recover.' " *Id.* Accordingly, "while an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress, . . . that is not the only form of injury remediable under § 4." *Id.* at 482-83 (internal citations omitted). Thus, the Eleventh Circuit's assertion that

Florida Seed had suffered no antitrust injury because it was not complaining of higher prices runs afoul of clear guidance from this Court.

The Eleventh Circuit's statement that Florida Seed did not complain about injury to competition but about injury to itself cannot be reconciled with the allegations of the Complaint. Like the plaintiff in *McCready*, Florida Seed does not complain of the effects of increased competition. To the contrary, Florida Seed alleges a decrease in competition in the residential non-selective herbicide market brought about in large measure by the actions of Monsanto toward Florida Seed. Petitioners' Complaint plainly stated:

> Among other things, [Monsanto] has manipulated and continues to manipulate the promotion of Roundup in relation to Kleenup, as well as the distribution channels for Kleenup, to assure that the Kleenup product loses market share during the period of transition contemplated by the FTC order. As part of these efforts, Monsanto abruptly altered long-standing distribution patterns when it terminated Florida Seed's distributorship on the pretext of a strategic decision to use fewer distributors. In fact, Monsanto terminated Florida Seed because it recognized that Florida Seed would vigorously promote Ortho products (including Kleenup) during a period when such promotion was not consistent with Monsanto's plan to cripple Kleenup.

R1-1-19. The Eleventh Circuit failed to appreciate how the injury to Florida Seed was intertwined with, and a primary cause of, the injury to competition in the relevant market. If the theory of the Complaint is correct (and at this point it must be taken to be), the diminution in interbrand competition between Roundup and Kleenup and Florida Seed's losses both trace back to Florida Seed's termination as an Ortho distributor. As pled, Florida Seed's injuries coincided directly with "the public detri-

ment tending to result from the alleged violation," *see Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1450 (11th Cir. 1991), because they flowed from the very aspect of Monsanto's conduct that, over time, is likely to increase price and restrict consumer choice.

The Eleventh Circuit's use of a black-letter rule of antitrust standing prevented it from appreciating that Monsanto's anticompetitive actions against Florida Seed impaired interbrand competition. In its zeal to fashion an inflexible rule that no distributor has standing to challenge its exclusion from the market following a merger or acquisition, the Eleventh Circuit either misread Petitioners' Complaint or failed to recognize the significance of its allegations.[5] The court below never appreciated that Monsanto had only temporary control over the Kleenup Assets or that Florida Seed was both a consumer of Kleenup and, because Monsanto engaged in dual distribution, a competitor of Monsanto. Monsanto's conduct directly affected *interbrand* competition: it terminated Florida Seed in order to disrupt the Kleenup distribution channels and thereby weaken the Kleenup product with

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[5] The antitrust laws are primarily concerned with the protection of interbrand competition. *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977). It is precisely this effect on interbrand competition that has made the Department of Justice wary of nonprice vertical restraints that allow a manufacturer to restrain interbrand competition by closing off efficient distribution channels to its competitors. *See* Rebecca P. Dick, Chief of Civil Task Force of the Department of Justice, Antitrust Division, *Remarks to American Bar Association Section of Antitrust Law and the Corporate Bar Association of Westchester and Fairfield*, 67 ANTITRUST & TRADE REG. REP. 637 (Dec. 1, 1994). Florida Seed's injuries arose in just such a setting and termination of Florida Seed was Monsanto's means of restraining interbrand competition by closing off efficient distribution channels to its competitors. In effect, the actions taken by Monsanto during its temporary control of two brands of residential non-selective herbicides were more akin to a horizontal restraint of trade than the vertical ones that are often scrutinized by the Justice Department.

which it would have to compete after divestiture. The Eleventh Circuit viewed the case as one seeking to challenge an unlawful merger when that issue was not before it. (5a-6a) (citing *Brunswick* regarding the objective in preventing mergers and explaining how distributors terminated following a merger have not suffered antitrust injury because their injuries "[do] not flow from that which makes a *merger* unlawful" (emphasis added)). Monsanto's acquisition of Ortho is not at issue here, and Florida Seed did not appeal the district court's denial of standing under Section 7 of the Clayton Act. The acquisition is relevant only because it set the stage for Monsanto's subsequent manipulation of interbrand competition. Monsanto's anticompetitive actions following the acquisition are in issue.

II. THE ELEVENTH CIRCUIT'S DECISION CONTRADICTS ITS OWN PRECEDENT.

Earlier Eleventh Circuit decisions acknowledge that a refusal to deal in order to monopolize is actionable. A refusal to deal coupled with a collateral anticompetitive purpose violates Section 2 of the Sherman Act. In *Universal Brands, Inc. v. Philip Morris Inc.*, 546 F.2d 30 (5th Cir. 1977), a decision relied upon both by Monsanto and the Eleventh Circuit, the former Fifth Circuit recognized that a manufacturer's right to choose to whom it will sell is far from absolute. "If the refusal to deal is a device used to acquire a monopoly . . . or to establish market dominance and drive out competition . . . it is illegal." *Id.* at 33. That is exactly what the Complaint alleges here. *See* R1-1-17, 18 & 19. The Eleventh Circuit's decision in this case to deny standing to a distributor victimized by a refusal to deal whenever a merger or acquisition preceded the refusal, even where the maintenance or enhancement of market dominance was intended, nullifies the rule of law set forth in *Universal Brands.*

Under the Eleventh Circuit's approach, an excluded distributor could never allege antitrust injury based on the loss of a distributorship. Such a rule does not comport with other decisions of that court. *See, e.g., DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186 (11th Cir. 1993), *amended* 997 F.2d 1340, *cert. denied*, 510 U.S. 1012 (1993) (terminated distributor granted standing). Like the plaintiff in *DeLong*, Petitioners here complain of a defendant taking advantage of a short-term position (control over both Roundup and Kleenup) in order to effectuate a long-term anticompetitive purpose (monopolization). Like the plaintiff in *Delong*, Florida Seed's injury was a loss of the opportunity to compete. *See id.* at 1198. In contrast to the Eleventh Circuit's assertion that Florida Seed suffered no antitrust injury—merely injury to itself—the court in *DeLong* noted that the distributor "sustained antitrust injury by loss of its . . . distributorship and consequent loss of sales and profits." *Id.* at 1199. It would be incongruous, at best, to hold that excluded distributors suffer no antitrust injury if their exclusion follows a merger, even where that exclusion resulted from a collateral anticompetitive purpose. *DeLong* teaches otherwise by holding that loss of the opportunity to compete may constitute antitrust injury.

DeLong is by no means unique. The Eleventh Circuit previously has "found antitrust standing on behalf of a victim of a refusal to deal that was designed to have an anticompetitive effect on the relevant market." *Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial Inc.*, 919 F.2d 1517, 1522 (11th Cir. 1990), *cert. denied*, 502 U.S. 815 (1991), *citing Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc.*, 710 F.2d 752 (11th Cir. 1983). Like Monsanto, the defendant in *Construction Aggregate* participated in two sectors of the relevant market—the aggregate production and the aggregate hauling sectors. The refusal to deal affected not only

the hauling sector (akin to distribution in this case) in which the plaintiff competed with the defendant, but also the aggregate production market. The Eleventh Circuit refused to establish a rule of law "that only one discrete sector of a market may be the target for a particular anti-competitive act." 710 F.2d at 764. Relying on *McCready*, the *Construction Aggregate* court ruled that even if the defendant aimed its conduct most directly at the production sector, "[it] must have foreseen that the direct effect of such a restraint would be to eliminate an innovative competitor from the field of aggregate hauling." *Id.* at 765. Ultimately, the *Construction Aggregate* decision upheld the hauler's antitrust standing, as well as its claims for damages based on lost profits. *Id.* at 786 (lost profits proper measure of competitive injury in market exclusion cases).

The Eleventh Circuit's opinion violates its own admonition not to convert a determination of antitrust standing into a trial on the merits. The Eleventh Circuit's denial of standing may be traceable to a misplaced skepticism regarding Florida Seed's substantive claim under Section 2 of the Sherman Act. (8a) ("Simply put, this is not an antitrust case but rather a breach of contract case.") The court's consideration of the merits of the Petitioners' substantive claim upon a motion to dismiss for lack of standing clearly violated its earlier statement in *Construction Aggregate*:

> Ultimate proof of injury in fact is not required in order for a plaintiff to have standing to sue. *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d at 1360 n.6. Otherwise, preliminary litigation over the threshold question of standing would result in a "trial on the merits."

Construction Aggregate, 710 F.2d at 763 n.24. Thus, the Eleventh Circuit in *Construction Aggregate* sought to avoid trying issues of fact in order to answer the threshold question of standing. The court's concluding remarks

strongly suggest that its apparent black-letter standing rule was announced because the court thought Petitioners' claims were "not antitrust [claims]," not because Petitioners were the wrong party to assert them.

In its opinion, the Eleventh Circuit cited with approval from a law review article that the court read as suggesting "per se legality" for a manufacturer's vertical integration into distribution. (6a) (citing Kenneth L. Glazer and Abbot B. Lipky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act,* 63 ANTITRUST L.J. 749 (1995)). The Eleventh Circuit's citation is telling because the referenced article is not about antitrust standing at all—it discusses the *substantive* standard that should govern a monopolist's liability for refusal to deal. If the Eleventh Circuit assumed there was no valid antitrust claim as part of its antitrust injury analysis, its approach was flawed.[6]

Equally as important, however, the article cited by the Eleventh Circuit recognizes certain "exceptional" circumstances in which a monopolist's efforts at vertical integration would be anticompetitive, and this case squarely fits one of those circumstances. According to the article, "circumstances are few when a monopolist can prevent attacks on its fundamental monopoly by tying up and thereby cutting off all available routes for distribution of a competitor's products." *Id.* at 780. Yet this is exactly what Florida Seed alleges in the instant case. The author's conclusion regarding vertical integration cases is based on the assumption that "interbrand competition cannot be affected" by reconfiguration of distribution for a *single* brand of product. *See id.* at 788. Often this may be true, but in this case Monsanto temporarily controlled

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[6] The Eleventh Circuit's view of Florida Seed's antitrust claim ignores the Supreme Court's admonition that antitrust standing must be tested assuming that plaintiff "can prove the facts alleged in . . . [the complaint]." *Associated General,* 459 U.S. at 526; *see also, Construction Aggregate,* 710 F.2d at 764.

both non-selective herbicide brands; accordingly, interbrand competition *was* adversely affected by Florida Seed's exclusion from the market. Other decisions of the Eleventh Circuit have recognized the validity of such a claim under Section 2: "[a] Section 2 claim can be supported by limiting the market definition to a single level of distribution where a vertically integrated manufacturer uses his dominant position at one level of competitive activity (manufacturing) to eliminate competition at another level (retailing)." *Ad-Vantage Tel. Directory Consultants v. GTE Directories Corp.*, 849 F.2d 1336, 1345 (11th Cir. 1987). It is at least ironic that the article cited by the Eleventh Circuit used the Eleventh Circuit's decision in *Ad-Vantage* to illustrate courts' "considerable difficulty" with monopolization cases involving vertical integration into distribution, *see* 63 ANTITRUST L.J. at 787 & n.156, but even the authors of that article recognize that where unusual circumstances suggest that interbrand competition is jeopardized, Section 2 liability is appropriate in a vertical integration case. The Eleventh Circuit's reliance on an article concerning the substance of Petitioners' Section 2 claim was wrong in the first instance, but the court compounded its error by misreading the article.

The rationale of the Eleventh Circuit also evidences that it has and, if unchecked, will continue to make factual assumptions reaching the merits of a case in order to create rigid rules of antitrust standing. As noted above, the court's decision below indicates that it assumed, without the benefit of any discovery, that Petitioners' substantive antitrust claim lacked merit. Moreover, in the face of allegations in the Complaint to the contrary, the Eleventh Circuit assumed that Florida Seed was a distributor terminated for efficiency following a merger; the court refused to consider the possibility (alleged in the Complaint) that the distributor termination here was part of a collateral anticompetitive plan on Monsanto's part. (6a). The Eleventh Circuit simply sought to categorize this case so that it could apply a rigid rule of standing.

This case represents only the latest example of the Eleventh Circuit's misguided approach to antitrust standing using inflexible rules. Professors Areeda and Hovenkamp criticized the Eleventh Circuit's earlier decision in *Todorov* for its unwarranted assumption regarding the motives of a plaintiff seeking to join an exclusive venture. P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 373'e3 (Supp. 1997). Like this case, *Todorov* was a market exclusion case. Areeda and Hovenkamp noted that the plaintiffs' motives in a case such as *Todorov* may have fallen into one of two categories, yet the Eleventh Circuit assumed a motivation that would deny antitrust standing to the plaintiffs. *Id.*[7] In like manner, the Eleventh Circuit has assumed in this case that all post-acquisition dealer terminations are efficiency-driven and fashioned a blanket standing rule around that premise.

III. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS.

The Eleventh Circuit's opinion conflicts with authority that the entity which is harmed in order to reduce competition suffers antitrust injury and has standing. As stated by the Eighth Circuit, a number of "cases plainly teach that a business, especially one with a large degree of market power, may violate Section 2 of the Sherman Act if it exercises its power to deal with others, *including its own distributors*, in a manner which is designed to

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[7] As one might expect, the Eleventh Circuit's tendency to fashion inflexible rules of antitrust standing has infected the district courts in this circuit. For example, Areeda and Hovenkamp have referred to a recent ruling in which a district court "incorrectly concluded" that a plaintiff wished to join an exclusive arrangement when, in reality, the plaintiff sought to disrupt the exclusivity. *See id.*, citing *Atlanta Pulmonary Diagnostic Clinic v. Haynes*, 1995-2 Trade Cas. ¶ 71,245 (N.D. Ga. 1994).

unreasonably restrain trade." *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 803 (8th Cir. 1987) (emphasis supplied), *citing Times-Picayune Publishing, Lorain Journal, Colgate, Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1300 (9th Cir. 1978) and *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32, 38-39 (D. Minn. 1945). Although a manufacturer generally may deal with whomever it chooses to distribute its products, courts have recognized that this right is not unrestricted. A manufacturer may not lawfully terminate distributors at will if "the manufacturer attempts to exact some collateral anticompetitive advantage." *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1030 (2nd Cir.), *cert. denied* 444 U.S. 917 (1979) (acknowledging that a Sherman Act Section 1 violation arises where a manufacturer seeks such a collateral anticompetitive purpose). *See also, Hewlett-Packard Co. v. Arch Associates Corp.*, 908 F. Supp. 265, 269 (D. Pa. 1995), *citing Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 760 (1984). This principle applies even where a manufacturer has a legitimate natural monopoly over its products. *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F. Supp. 110, 121 (E.D.N.Y. 1976). Of course, the facts of this case present the additional element of Monsanto's temporary control not only of its products, but also the products of another brand.

Like Florida Seed, the plaintiff in *Hartz* was a distributor terminated by a manufacturer that was dominant in the relevant market. As in this case, the plaintiff was both a competitor of its supplier and a consumer of its products. The distributor's relationship with its supplier in *Hartz* deteriorated as a result of the distributor's distribution of products that competed with the supplier's products. As a result of the termination of the plaintiff's distributorship, the plaintiff lost approximately one-half of its original customers, many of whom were its largest accounts.

The reasoning of the court in *Hartz* strongly supports Florida Seed's standing in this action. The *Hartz* court

noted that " 'an anticompetitive practice may have an economic justification, but its use may be undertaken with unlawful intent and in the desire to achieve an unlawful goal.' " *Id.* at 802, *quoting United States v. Dairymen, Inc.*, 660 F.2d 192, 195 (6th Cir. 1981). The *Hartz* court held that a jury reasonably could have concluded that the defendant manufacturer attempted to "achieve a monopoly by depriving the public of the advantages that flow from free competition." 810 F.2d at 802. In like manner, Monsanto has attempted to achieve or sustain a monopoly by depriving the public of the free flow of competition in the residential non-selective herbicide market. While the defendant in *Hartz* offered reasons for its termination of the plaintiff distributor, the court found that the defendant's reasons for terminating the plaintiff reasonably could have been pretextual and that the actions instead, "were specifically designed to destroy a perceived source of competition." *Id.* at 803-04. Here, the Complaint alleges that Monsanto's "strategic decision to use fewer distributors" was pretextual, and that Monsanto terminated Florida Seed as a Kleenup distributor not because of valid efficiency concerns, but rather to further Monsanto's anticompetitive attempt to weaken the Kleenup product, and thereby to weaken competition in the relevant market. R1-1-17 to -19.

Just as the court in *Hartz* found that a jury reasonably could have concluded that the defendant there set out to prevent the plaintiff distributor "from being a source of competitive pet products and to prevent [the plaintiff] from surviving as a financially stable distributor," a court reviewing the actions taken by Monsanto in relation to Florida Seed could (and should be afforded an opportunity to) reach a similar conclusion. *Id.* at 804. *Hartz* recognizes that a distributor may be targeted by a manufacturer or supplier of goods in order to weaken the competition supplied by another supplier or manufacturer and that such a distributor may successfully bring a monopolization claim. This method of causing harm to a distribu-

tor who also distributes competitive products not only results in direct injuries but also in antitrust injuries. Under the reasoning of *Hartz*, Florida Seed was both a consumer and a competitor of Monsanto in the relevant market alleged in the Complaint and had standing to bring an action against Monsanto under Section 2 of the Sherman Act.

The result in *Hartz* is supported further by the Eighth Circuit's subsequent decision in *S.D. Collectibles, Inc. v. Plough, Inc.*, 952 F.d 211 (8th Cir. 1991). There the court noted that although both plaintiffs in the *Hartz* case were involved in the distribution of the defendant supplier's products, only one "was a distributor who bought and sold [the defendant's] products." *Id.* at 213. Noting that the distributor, and not the broker, was granted antitrust standing, the *S. D. Collectibles* court stated "that a broker, by contrast to a distributor, is not a consumer of the product marketed." *Id.* at 214. Thus, the Eighth Circuit reaffirmed its position from four years earlier that a distributor who buys and sells a manufacturer's products is a consumer of those products. According to Professors Areeda and Turner, "there is no doubt about the standing of the antitrust offender's immediate customer, whether or not that customer is an ultimate consumer or non-commercial entity." P. Areeda & D. Turner, *Antitrust Law* ¶ 337a at 183 (1978).[8] Florida Seed purchased products, including Kleenup, from Monsanto and then resold those products to retail accounts. As a purchaser of residential non-selective herbicides, Florida Seed was a consumer of Monsanto's residential non-selective herbicides, just as the plaintiff in *Hartz* was a consumer of its supplier's products. Similarly, Florida Seed suffered antitrust injury at the hands of its supplier and should have antitrust standing.

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[8] Professors Areeda and Hovenkamp have noted that while "no magic inheres in the 'consumer' label, it is always helpful to understand whether a plaintiff is complaining of an antitrust violation disrupting competition in a market in which he buys." P. Areeda & H. Hovenkamp, *Antitrust Laws* ¶ 337.1 at 428 (Supp. 1993).

The Eleventh Circuit's opinion conflicts with decisions of other circuits that have found antitrust standing where the victim of a refusal to deal has alleged a collateral anticompetitive purpose. Other Sherman Act precedent also supports a finding that Florida Seed has standing in this case. For example, the Tenth Circuit has held that where a complaint alleged more than a mere substitutition of distributors, a terminated distributor had standing to bring an action under Section 1 of the Sherman Act against a brewing company and its exclusive distributor. *Skyview Distrib., Inc. v. Miller Brewing Co.*, 620 F.2d 750 (10th Cir. 1980). The *Skyview* court recognized the general proposition that the mere substitution of distributors, absent a restraint of trade, does not violate the Sherman Act. *Id.* at 752. However, the complaint went beyond mere allegations of dealer substitution, alleging that the plaintiff "was 'eliminated' from the wholesale distributorship business, and competitors of [the defendant brewing company] were in fact unable to compete with [the defendant] in the local market." *Id.* The court thus held that because the complaint alleged more than mere substitution, it was "legally sufficient to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)." *Id.*

Similarly, the First Circuit granted standing to a terminated distributor pursuing claims under Sections 1 and 2 of the Sherman Act. *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979), *cert. denied* 449 U.S. 890 (1980). The plaintiff distributor in *Bombardier* was terminated on the asserted ground that it defaulted under its distribution agreement. The plaintiff contended and the court found, however, that the plaintiff distributor was terminated because it got in the way of a scheme to allocate markets, an anticompetitive action. *Id.* at 13, 15. "[I]n order to accomplish the division of markets, it was necessary to deprive [the plaintiff] of the [relevant] product. . . ." *Id.* at 15. Because the distributor linked the defendants' anticompetitive behavior to its own injury resulting from termination, the court determined that the

case presented more than the mere switching of distributors. *Id.* Consequently, the court found that the plaintiff distributor suffered antitrust injury. *Id.*

Much the same as the plaintiffs in *Skyview* and *Bombardier*, Florida Seed has alleged that it was terminated by Monsanto because it stood in the way of an anticompetitive action—the weakening of the Kleenup brand and the reinforcement of Monsanto's dominance in the relevant market. As was true in *Bombardier*, in order to accomplish this anticompetitive goal, it was necessary to deprive Florida Seed of the crucial product, Kleenup. Thus, Petitioners have alleged the "something more" in relation to Monsanto's refusal to deal and would have standing under the views of the First, Eighth and Tenth Circuits.

IV. THE ELEVENTH CIRCUIT'S USE OF THE DISCREDITED TARGET AREA TEST LEAVES A WRONG WITHOUT A REMEDY.

The Eleventh Circuit clings to the discredited target area test. While the Eleventh Circuit held that Florida Seed had not suffered antitrust injury and, consequently, it did not have to address the second prong of its antitrust standing analysis—whether the plaintiff is an efficient enforcer of the antitrust laws—it is curious to note that the Eleventh Circuit still maintains its use of the "target area test" which this Court expressly rejected in *Associated General*, 459 U.S. at 536 n.33. (4a) ("This [efficient enforcer] determination is predicated on the 'target area test.' "). The Eleventh Circuit gave no indication that it would consider all the factors outlined by this Court in *Associated General.*

Florida Seed has standing under the test announced by this Court. Analyzing the Complaint against the *Associated General* factors, as the courts below should have done, there is no doubt that Florida Seed is an efficient enforcer of the antitrust laws. First, Florida Seed has alleged a causal connection between Monsanto's antitrust

violation (monopolization or attempted monopolization) and harm to Florida Seed. R1-1-17, 18. In furtherance of Monsanto's effort to acquire or maintain its monopoly power in the residential non-selective herbicide market, Monsanto terminated Florida Seed as a distributor of Kleenup, thus preventing Florida Seed from selling Kleenup and resulting in multi-million dollar losses and loss of the ability to sell to large retail accounts. R1-1-18.

Second, Plaintiffs have alleged an intent by Monsanto to cause the harm. R1-1-18, 19 ("Monsanto terminated Florida Seed because it recognized that Florida Seed would vigorously promote Ortho products (including Kleenup) during a period when such promotion was not consistent with Monsanto's plan to cripple Kleenup."). Third, Plaintiffs have alleged a direct causal link between their injury and the market restraint. R1-1-17 ("It was not consistent with Monsanto's anticompetitive strategy to allow vigorous promotion of Kleenup at a time when Monsanto was de-emphasizing Kleenup and pushing Roundup. Florida Seed had proven to be a capable Ortho distributor and an independent force at the distributor level, and as such, was not consistent with Monsanto's overall program to control and direct product distribution in the relevant market."). Finally, the damages suffered by Florida Seed are not speculative in nature and there is no risk of duplicative recovery or complex apportionment of damages. Florida Seed can quantify the damages resulting from its inability to carry a recognized residential non-selective herbicide in its product mix. R1-1-18. Florida Seed only seeks to recover damages based on Monsanto's actions in preventing Florida Seed from competing in the relevant market.

The Eleventh Circuit's decision leaves a wrong without a remedy. As to the "efficient enforcer" prong of the standing analysis, the Eleventh Circuit concluded that "the proper parties to challenge Monsanto's acquisition of Ortho are direct purchasers in the non-selective herbicide

market." (7a). The statement is surprising because at the time of the wrongs complained of, Florida Seed *was* a direct purchaser of Kleenup product. The Eleventh Circuit apparently reasoned that Florida Seed is not now an efficient enforcer of the antitrust laws because Monsanto terminated Florida Seed as a distributor prior to commencement of the instant action. Such a rule would never allow a terminated distributor to be considered an efficient enforcer of the antitrust laws, and would carry with it the added twist that an otherwise proper plaintiff may lose standing solely by virtue of the antitrust violation itself. *But cf. Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) (*former* Monsanto distributor successfully asserted price fixing claim against Monsanto). According to the Eleventh Circuit's decision in this case, the terminated distributor in *Monsanto* never should have been allowed to proceed beyond the threshold issue of antitrust standing.

By limiting the proper plaintiffs to "direct purchasers in the non-selective herbicide market," (7a), the Eleventh Circuit effectively has left a wrong without a remedy and has formulated a rule that is "likely to leave a significant antitrust violation undetected or unremedied." *See Associated General*, 459 U.S. at 542. This is so because ultimate consumers in the non-selective herbicide market will be denied standing as indirect purchasers; and direct purchasing middlemen, who have not been excluded, as Florida Seed was, will have suffered no injury-in-fact. Indeed they will have benefitted from Monsanto's anticompetitive reconfiguration of distribution channels. Even though they ultimately may bear the brunt of supracompetitive prices resulting from Monsanto's weakening of Kleenup, ultimate consumers will be denied federal antitrust standing under this Court's decision in *Illinois Brick* because of concerns over duplicative damages or complex damage apportionment. Perhaps this is why, in the more than three years since this action was commenced, to Petitioners' knowledge no similar or related

antitrust action against Monsanto has been commenced by a "better" plaintiff. As pointed out by Professors Areeda and Hovenkamp, the *Illinois Brick* doctrine would obstruct consumer claims because a court must be concerned that allowing consumers to pursue an action in cases like this one would create serious difficulties in apportioning damages and would result in plaintiffs having little incentive to pursue an antitrust action vigorously. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 371c (rev. ed. 1995).

On the other hand, direct purchasing middlemen who remain in the market will have experienced no injury-in-fact from Monsanto's anticompetitive manipulation of distribution channels. If anything, those remaining distributors will face lessened competition from the weakened Kleenup brand, and will *benefit* from increased concentration at the distributor level. Under current law, such direct purchasers will be denied antitrust standing. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337 (1990) ("respondents stand to gain from any conspiracy to raise the market price"); *Caribe BMW Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 753 (1st Cir. 1994). Similarly, Platte, the purchaser of the Kleenup Assets, did not suffer injury-in-fact because it purchased those assets, presumably at fair market value, after Monsanto's anticompetitive actions. In a market exclusion case such as this one, if the excluded middleman is denied standing, the interests of the ultimate consumer will be vindicated by no one.

CONCLUSION

The errors below raise important questions that warrant clarification by this Court. The Eleventh Circuit has acknowledged the "struggle" of this Court and the lower courts to identify proper plaintiffs in antitrust cases. *See Todorov*, 921 F.2d at 1449 & n.16. This Court likewise has acknowledged a lack of precision in its standing analysis, even comparing that analysis to the elusive judicial search for proximate cause. *See Associated General*, 459 U.S. at 535-36. The decision below, insofar as it is at odds with precedents of this Court as well as other circuits and even the Eleventh Circuit, will contribute to this struggle. Worse yet, however, the decision below may tempt lower federal courts to accept the bright line rule that "distributors who are terminated following a merger suffer no antitrust injury," (6a), and to fashion other equally clear rules to address recurring fact patterns. Such a result may reduce the complexity of the issues facing the lower courts but at the expense of effective and efficient private antitrust enforcement.

Certainly this case has implications beyond its effect on the distribution of weed killers in the residential lawn and garden products market. Because they may involve dangerous aggregations of market power, acquisitions are an extremely sensitive area of antitrust concern. It would be unwise to sanction an antitrust standing rule fashioned around the presumption that post-acquisition manipulation of product distribution channels is always driven by efficiency. Such a rule potentially would allow manufacturers to restrain interbrand competition—as Monsanto did here—by reconfiguring distribution channels to accomplish anticompetitive purposes. Moreover, conduct that is actionable in the absence of an acquisition would cease to be actionable if it follows an acquisition. If efficiency considerations really did motivate Monsanto in this case (and the Complaint alleges otherwise), Monsanto should

prevail on the merits. But to assume the answer to that question and deny standing is simply erroneous.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES M. CROOK
JOHN F. MANDT *
PHILLIP A. NICHOLS
BALCH & BINGHAM LLP
P.O. Box 306
Birmingham, Alabama 35201
(205) 251-8100
Counsel for Petitioners
Florida Seed Company, Inc.
and Frit Industries, Inc.

July 23, 1997

* Counsel of Record

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 96-6080

FLORIDA SEED COMPANY, INC., a corporation,
FRIT INDUSTRIES, INC., a corporation,
Plaintiffs-Counter-Defendants-Appellants,
v.

MONSANTO COMPANY, a corporation,
Defendant-Counter-Claimant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

Feb. 18, 1997

Before TJOFLAT and DUBINA, Circuit Judges, and STAGG*, Senior District Judge.

DUBINA, Circuit Judge:

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* Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.

Plaintiffs/Appellants Florida Seed Company, Inc. ("Florida Seed") and Frit Industries ("Frit") appeal the district court's judgment dismissing their Sherman Act claim against Defendant/Appellee Monsanto Company ("Monsanto"). The district court held that Plaintiffs lacked standing to assert their antitrust claims. We affirm.

I. BACKGROUND

This case arises out of Monsanto's 1993 acquisition of the Chevron Corporation's Ortho lawn and garden business ("Ortho"). Ortho markets some 200 lawn and garden products. Florida Seed is engaged in wholesale distribution and marketing of lawn and garden products. Prior to Monsanto's acquisition of Ortho, Florida Seed handled the product lines of both Monsanto and Ortho.

The Federal Trade Commission ("FTC") believed that Monsanto's acquisition of Ortho created competitive issues as to one of Ortho's products, a nonselective herbicide called "Kleenup." Kleenup is based on glyphosate, a patented ingredient that Ortho purchases from Monsanto. Monsanto also uses glyphosate in its nonselective herbicide called "Roundup." Monsanto entered into a consent decree with the FTC agreeing to divest to a suitable purchaser the trademark "Kleenup." The agreement also provided that Monsanto would sell a significant volume of glyphosate, plus manufacturing know-how and certain regulatory approvals and filings, on a time schedule acceptable to the FTC. The consent decree does not contain any reference to the distribution channels for Kleenup.

After acquiring Ortho, Monsanto notified Florida Seed that its distributorship agreement for Ortho products would not be renewed following its expiration. Monsanto stated that the decision was part of a broader strategic decision to use fewer distributors. Following expiration of the distributorship relationship, Florida Seed refused to pay Monsanto certain amounts owed. Monsanto therefore

demanded payment from Frit, which had guaranteed Florida Seed's debt. Florida Seed and Frit then filed this antitrust suit.

Plaintiffs allege that Monsanto engaged in monopolization and attempted monopolization of the residential nonselective herbicide market in violation of Section 2 of the Sherman Act by its acquisition of Ortho and its termination of Florida Seed's distributorship.[1] Plaintiffs contend that Monsanto's decision was aimed at damaging the value of Kleenup prior to its divestiture under the FTC consent decree.

II. ISSUE

Whether the district court properly dismissed Plaintiffs' Sherman Act claim because they lacked standing to assert such claim.

III. STANDARD OF REVIEW

"The question of standing is one of law." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991). Accordingly, we review *de novo* the district court's judgment of dismissal. *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1194 (11th Cir.), *cert. denied*, 510 U.S. 1012, 114 S.Ct. 604, 126 L.Ed.2d 569 (1993).

IV. DISCUSSION

A private plaintiff seeking damages under the antitrust laws must establish standing to sue. Antitrust standing requires more than the "injury in fact" and the "case or controversy" required by Article III of the Constitution. *Todorov*, 921 F.2d at 1448. Rather, the doctrine of anti-

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[1] Plaintiffs also brought a claim under the Clayton Act, which the district court dismissed. Plaintiffs do not contest this ruling on appeal. Moreover, Plaintiffs asserted various claims under state law that were not ruled on by the district court and have been stayed pending this appeal.

trust standing reflects prudential concerns and is designed to avoid burdening the courts with speculative or remote claims. *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 545, 103 S.Ct. 897, 912, 74 L.Ed.2d 723 (1983). *See also Todorov,* 921 F.2d at 1448 ("Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws."); PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 334.2 at 409 (1993 Supp.).

We follow a two-pronged approach in deciding whether a plaintiff has antitrust standing. *Municipal Utils. Bd. of Albertville v. Alabama Power Co.,* 934 F.2d 1493, 1499 (11th Cir.1991). First, the plaintiff must establish that it has suffered "antitrust injury." *Id.* As the Supreme Court has made clear, to have standing antitrust plaintiffs "must prove more than injury casually linked to an illegal presence in the market [*i.e.*, but for causation]. Plaintiffs must prove antitrust injury, which is to say injury of the type that the antitrust laws were inended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

Second, the plaintiff must establish that it is an efficient enforcer of the antitrust laws. *Municipal Utils. Bd. of Albertville,* 934 F.2d at 1499. This determination is predicated on the "target area test." *Austin v. Blue Cross & Blue Shield of Ala.,* 903 F.2d 1385, 1388 (11th Cir. 1990). The target area test requires that an antitrust plaintiff both "prove that he is within that sector of the economy endangered by a breakdown of competitive conditions in a particular industry" and that he is "the target against which anticompetitive activity is directed." *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.,* 748 F.2d 602, 608 (11th Cir.1984), *cert. denied sub nom., Patterson v. Buena Vista Distribu-*

tion Co., 474 U.S. 1013, 106 S.Ct. 544, 88 L.Ed.2d 473 (1985). Basically, a plaintiff must show that it is a customer or competitor in the relevant antitrust market. *Associated General Contractors*, 459 U.S. at 539, 103 S.Ct. at 909.

A. Standing of Florida Seed

Plaintiffs' complaint relates to Florida Seed's inability to purchase nonselective herbicides from Monsanto, not to an increase in prices or to a lessening of competition. At one time, Florida Seed was both a customer and a distributor of Kleenup. Now, Florida Seed is neither. In fact, Florida Seed admits that the "termination of [its] distributorship is at the heart of this case." Plaintiffs-Appellants Brief at 5. Nevertheless, Plaintiffs argue that they may maintain an antitrust action based on the terminated distributorship because, in their view, Monsanto violated the Sherman Act "by dealing with its own distributor in furtherance of an anticompetitive purpose." *Id.* at 26. We disagree.

The Supreme Court pointed out in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), that "[e]very merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects." *Id.* at 487, 97 S.Ct. at 696. "The objective in preventing certain mergers is . . . to prevent [the acquiring party] from obtaining sufficient market power to raise prices. . . ." *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d at 1172, 1176 (5th Cir.1976).[2] Obviously, mergers often have an adverse impact on those employees, suppliers, or distributors made redundant by a merger. In many instances,

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

those displaced by a merger suffer an economic loss. However, this loss is not an antitrust injury because it does not flow from that which makes a merger unlawful. Injuries like that suffered by Florida Seed do not "coincide[] with the public detriment tending to result from the alleged violation." *Todorov*, 921 F.2d at 1450; *see also* Kenneth L. Glazer and Abbot B. Lipky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 ANTIT. L.J. 749, 787-90 (1995) (suggesting "per se legality" for manufacturer's efforts to vertically integrate distribution of its own products).

Relying on *Brunswick*, courts have consistently denied standing to distributors who were terminated, or whose contracts were not renewed, following a merger. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 345, 110 S.Ct. 1884, 1895, 109 L.Ed.2d 333 (1990); *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762 (2nd Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 381, 133 L.Ed.2d 304 (1995); *Sierra Wine & Liquor Co. v. Heublein, Inc.*, 626 F.2d 129 (9th Cir.1980); *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977); *Universal Brands, Inc. v. Philip Morris, Inc.*, 546 F.2d 30 (5th Cir.1977); *Return on Inv. Systems v. Trans-Logic Corp.*, 702 F.Supp. 677 (N.D.Ill.1988); *Bryant Heating & Air Conditioning Corp., Inc. v. Carrier Corp.*, 597 F.Supp. 1045, 1051-53 (S.D.Fla.1984); *A.G.S. Elecs., Ltd. v. B.S.R. (U.S.A.), Ltd.*, 460 F.Supp. 707, 710 (S.D.N.Y.), *aff'd*, 591 F.2d 1329 (2nd Cir.1978). The teaching of these cases is clear: distributors who are terminated following a merger suffer no antitrust injury. Plaintiffs have not shown why we should treat Florida Seed differently. Florida Seed complains not about higher prices or about injury to competition, but about injury to itself. Thus, Florida Seed has suffered no antitrust injury.[3]

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[3] Two leading antitrust commentators have addressed whether those displaced by a merger have standing to sue under the antitrust laws.

> Many mergers have been challenged by suppliers (including dealers, franchisees, and employees providing the merging

Because we hold that Florida Seed has suffered no antitrust injury, we need not address whether Florida Seed would be an efficient enforcer of the antitrust laws as required by the second prong of our standing analysis. However, it is clear from the record that Florida Seed is not an efficient enforcer. Florida Seed cannot allege any nexus between the injury it has suffered and a lessening of competition in the United States. In this case, if the injury the antitrust laws address—the power to raise prices and reduce output—has occurred, the proper parties to challenge Monsanto's acquisition of Ortho are direct purchasers in the nonselective herbicide market.

B. Standing of Frit

Frit is not a customer or competitor in any relevant market, but merely the sole shareholder of Florida Seed and a guarantor of its debt. Plaintiffs allege injury to Florida Seed only, not to Frit. The only injuries allegedly suffered by Frit are as a shareholder and guarantor. Thus, Frit has suffered no antitrust injury. Courts uniformly

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> firms with distribution and other services) displaced as a result of the merger. Injury-in-fact may be doubtful when equivalent opportunities are available elsewhere. If other opportunities do not exist [as alleged by Florida Seed], *displaced suppliers made redundant by a merger suffer actual losses but not antitrust injury, for the rationale for condemning a merger lies in its potential for supracompetitive pricing, not in its potential for cost savings and other efficiencies.* A merger that actually brings about supracompetitive prices and diminished output reduces the need for inputs and can therefore injure suppliers. Although such an injury connects more closely with the rationale for finding a violation, it is still not antitrust injury because it is neither the means by which output is restricted nor the direct concern of antitrust rules protecting product market competition.
>
> PHILIP AREEDA & HERBERT HOVENKAMP, *Antitrust Law* ¶ 381 (rev. ed. 1995) (emphasis added). Professors Areeda and Hovenkamp support our view that Florida Seed has suffered no antitrust injury from Monsanto's acquisition of Ortho.

have held that stockholders, even sole stockholders such as Frit, lack standing to bring an antitrust suit for injury to their corporations. *See, e.g., Lovett v. General Motors Corp.*, 975 F.2d 518 (8th Cir.1992), *rev'd in part*, 998 F.2d 575 (1993), *cert. denied*, 510 U.S. 1113, 114 S.Ct. 1058, 127 L.Ed.2d 378 (1994); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2nd Cir.), *cert. denied*, 479 U.S. 987, 107 S.Ct. 579, 93 L.Ed.2d 582 (1986); *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 450 (9th Cir.), *cert. denied*, 472 U.S. 1018, 105 S.Ct. 3481, 87 L.Ed.2d 616 (1985); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 710 (11th Cir.1984); *Harris v. Shell Oil Co.*, 371 F.Supp. 376, 377 (M.D.Ala. 1974). We agree with the foregoing cases and hold that Frit has suffered no antitrust injury. Accordingly, the district court properly concluded that Frit did not have standing under the antitrust laws to challenge Monsanto's acquisition of Ortho.

V. CONCLUSION

In a recent Seventh Circuit case, Judge Easterbrook wrote that "this is a mundane commercial case, in which a buyer has used the antitrust laws to postpone paying its debts." *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756, 763 (7th Cir.1996). The same is true here. Simply put, this is not an antitrust case but rather a breach of contract case. Plaintiffs' pursuit of this case has forestalled for almost three years Monsanto's efforts to collect the debt owed it by Plaintiffs. In the words of Judge Easterbrook, the "[t]ime for payment is at hand." *Id.*

We affirm the district court's judgment of dismissal.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
M.D. ALABAMA
NORTHERN DIVISION

Civ. A. No. 94-D-514-N

FLORIDA SEED COMPANY, INC., and
FRIT INDUSTRIES, INC.,
Plaintiffs,

v.

MONSANTO COMPANY,
Defendant.

Nov. 9, 1995

MEMORANDUM OPINION AND ORDER

DE MENT, District Judge.

Before the court is defendant Monsanto Company's motion filed June 23, 1994, to dismiss the federal antitrust claims on the ground that the plaintiffs lack standing. Plaintiffs Florida Seed Co., Inc., and Frit Industries, Inc., responded in opposition on August 4, 1994. After careful consideration of the arguments of counsel, the applicable case law and the record as a whole, the court finds that the defendant's motion is due to be granted.

JURISDICTION AND VENUE

As to the federal antitrust claims, the plaintiffs predicate subject-matter jurisdiction under 28 U.S.C. § 1331 (federal-question jurisdiction). As to the state-law claims, the plaintiffs invoke the court's diversity-of-citizenship jurisdic-

tion, 28 U.S.C. § 1332, and principles of supplemental jurisdiction, 28 U.S.C. § 1367. Personal jurisdiction and venue are not contested.

PARTIES

(1) Plaintiff Florida Seed Company, Inc. (Florida Seed"), is engaged in the business of wholesale distribution and marketing of lawn and garden products. Florida Seed is incorporated in Florida and also maintains its principal place of busines in Florida.

(2) Plaintiff Frit Industries, Inc. ("Frit"), is the sole stockholder of Florida Seed. Frit is incorporated in Alabama with its principal place of business in Alabama. In addition to its ownership of Florida Seed, Frit also is involved in a variety of businesses, including the development and production of lawn and garden products.

(3) Defendant Monsanto Company ("Monsanto") is engaged in the manufacture and sale of a diversified line of chemicals, including lawn and garden products. Monsanto is incorporated in Delaware with its principal place of business in Missouri.

FINDINGS OF FACT

In viewing the allegations of the complaint as true, the court finds the following facts controlling for purposes of ruling on Monsanto's motion:

On May 2, 1994, the plaintiffs commenced this action in the United States District Court for the Middle District of Alabama and have asserted that certain acts of Monsanto violate the federal antitrust statutes and state laws. This controversy primarily stems from Monsanto's alleged illegal acquisition of its competitor in the residential nonselective herbicide market, Ortho Consumer Products Division of Chevron Corporation ("Ortho"), and the subsequent termination of Florida Seed as an Ortho distributor.

Count I of the complaint asserts that Monsanto has attempted to create, and has in fact created, a monopoly in the residential nonselective herbicide market in violation of § 2 of the Sherman Act (15 U.S.C. § 2) and state antitrust laws. The plaintiffs assert that Count I also encompasses a monopoly leveraging claim under § 2 of the Sherman Act. Count II sets forth a cause of action under § 7 of the Clayton Act (15 U.S.C. §18) for Monsanto's alleged unlawful acquisition of Ortho.[1]

Monsanto manufacturers and sells an agricultural product named Roundup, a residential non-selective herbicide designed to kill all types of vegetation, such as brush, weeds and grasses. Monsanto holds a United States patent to Roundup's key ingredient called glyphosate. Although Monsanto's United States patent will not expire until the year 2000, its European patent expired in 1991. According to the plaintiffs, the expiration of Monsanto's patents and threatening competition caused Monsanto to take steps to maintain its market dominance, which included the acquisition of its competitor, Ortho. Those steps, assert the plaintiffs, are aimed at the destruction of Ortho and directed toward Florida Seed.

Until the Spring of 1993, Monsanto sold glyphosate to Ortho, which used the patented ingredient in a similar product sold under the brand name of Kleenup. According to the plaintiffs, Monsanto controls 63% of the residential non-selective herbicide market through its ownership of Roundup, and Kleenup accounts for another 22% of the market.

From the mid-1980s to 1992, Florida Seed had a non-exclusive distributorship agreement with Monsanto to dis-

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[1] The plaintiffs also seek redress under state laws for breach of contract (Count III), misrepresentation (Count IV), and unfair competition/wrongful termination in violation of Florida statutes "or other applicable state law" (Count V). The validity of the state law claims is not before the court.

tribute Roundup and other Monsanto products to retail stores chain accounts, such as Wal-Mart and The Home Depot. Under the agreement, which was renewed annually through course of dealing, Florida Seed's marketing and sales territory included Alabama, Florida and Georgia.

Florida Seed simultaneously held a nonexclusive distributorship agreement with Ortho to market and sale its products at wholesale (including Kleenup) in Alabama, Florida, Georgia, Louisiana and Mississippi. This agreement also was renewed annually through course of dealing. According to the plaintiffs, Florida Seed was one of Ortho's leading and most effective distributors in the nation.[2] During the period when Florida Seed acted as a distributor of Monsanto and Ortho products, both companies restricted Florida Seed from manufacturing competing lawn and garden products.

By letter dated July 1, 1992, Monsanto notified Florida Seed that it would not renew Florida Seed's distributorship agreement, which was scheduled to expire on September 30 of the same year. The letter stated that Monsanto had made a "strategic decision' " to " 'work with fewer authorized Monsanto distributors.' " Pl.s' Compl. at ¶ 24. Following the termination of its distributorship agreement with Monsanto, Florida Seed continued to market and sell Kleenup for Ortho.

By letter dated May 20, 1993, Monsanto notified Florida Seed that Monsanto had acquired Ortho and that it would honor all current distribution agreements. Subsequently, in a letter dated July 23, 1993, Monsanto again wrote Florida Seed and stated that when Florida Seed's

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[2] In support of this factual assertion, the plaintiff's aver that in 1992, Ortho began reducing the number of outside distributors and initiating direct sales to large retail chains. According to the plaintiffs, while Ortho terminated approximately thirty distributors under its "Distributor Rationalization Program," it retained Florida Seed. *See* Pl.s' Compl. at ¶ 26.

current agreement to distribute Kleenup and other former Ortho products expired on September 30, 1993, Monsanto would not renew the distributorship agreement. The stated reason for nonrenewal was again a purported business decision by Monsanto to use fewer distributors.

Later, Monsanto sent Frit. Florida Seed's parent corporation, a "Guaranty" demanding that Frit pay Ortho all indebtedness owned by Florida Seed and return any products not yet sold. Monsanto further stated that the "Guaranty" had been assigned to it in its acquisition of Ortho.

Monsanto's proposed acquisition of Ortho independently caused the Federal Trade Commission ("FTC") to file an administrative complaint against Monsanto. According to the plaintiffs, the FTC asserted, among other things, that the acquisition of Kleenup would grant Monsanto a monopoly in the residential non-selective herbicide market, would reduce competition in the United States for the production and sale of this type of herbicide and would create barriers to market entry.

Subsequently, on September 1, 1993, Monsanto entered into a consent decree with the FTC to resolve allegations that the acquisition violated federal antitrust laws. The consent decree allowed Monsanto to acquire Ortho but placed certain divesture restrictions on the purchase of Kleenup. In part, Monsanto agreed to sell the chemical formulation and the trademark for Kleenup by September 1994 and to maintain the marketability of the Kleenup assets until the divesture was complete.[3] The consent decree further required that for a period of ten years, Mon-

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[3] When the complaint was filed in this case, the purchasing company of the Kleenup assets had not yet been determined. The court's independent research reveals that the FTC approved the divesture of the Kleenup trade name and other related assets to Platte Chemical Co., a subsidiary of ConAgra, Inc. *See* Federal Trade Commission (News Release), 1995 WL 507355, Sept. 14, 1995.

santo would not acquire any interest in the residential non-selective herbicide market.

The plaintiffs further allege that following Monsanto's termination of Florida Seed's distributorship agreement with Ortho, Florida Seed was forced to withdraw from National Prime Source. As stated by the plaintiffs, National Prime Source is a joint venture among fifteen wholesale distributors of lawn and garden products that Florida Seed helped organize in 1992. According to the plaintiffs, National Prime Source "enable[d] its members to compete for multi-regional and national mass merchandising accounts which generally preferred to do business with distributors offering centralized bidding and administrative functions." *Id.* at ¶ 22. The plaintiffs also aver that Florida Seed has sustained substantial damages from its inability to sell to retail chain store accounts.

The plaintiffs seek treble damages under the federal antitrust laws, compensatory damages and attorneys fees. The plaintiffs also request a declaratory judgment that any amount due and payable from Florida Seed to Monsanto under the "Guaranty" are offset by the damages owed to Florida Seed by Monsanto and that Frit is not liable under the "Guaranty" for any debts of Florida Seed to Monsanto.

DISCUSSION

I. Antitrust Standing

A. *Standard of Review*

Whether a plaintiff has antitrust standing to bring suit is a question of law, *Municipal Utils. Bd. of Albertville v. Alabama Power Co.*, 934 F.2d 1493, 1498 (11th Cir. 1991), and may be raised by a motion to dismiss. *See generally Austin v. Blue Cross & Blue Shield of Alabama*, 903 F.2d 1385 (11th Cir.1990). In ruling on a motion to dismiss for lack of standing, the court must assume that the factual allegations in the complaint are true. *SAS of*

Puerto Rico, Inc. v. Puerto Rico Tel. Co., 48 F.3d 39, 40 (1st Cir.1995); Fed.R.Civ.P. 12(b)(6). Dismissal is warranted only "if it is clear that no relief could be granted" under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984). The court further stresses that "the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceeding low." *Quality Foods v. Latin Am. Agribusiness Dev.*, 711 F.2d 989, 995 (11th Cir.1983).

B. The Antitrust Laws and General Principles of Antitrust Standing

Monsanto does not challenge the merits of the federal antitrust claims but asserts that the plaintiffs lack standing under § 2 of the Sherman Acts and § 7 of the Clayton Act. The plaintiffs have raised several theories that allegedly confer standing, each of which the court will address after setting forth the applicable antitrust statutes and the general principles of antitrust law.

Section Two of the Sherman Act provides sanctions for "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce. . . ." 15 U.S.C. § 2. Section 7 of the Clayton Act provides, in part, as follows:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be sub-

> stantially to lessen competition, or tend to create a monopoly.

15 U.S.C. § 18.

Section 4 of the Clayton Act, in turn, provides a damages remedy for violations of all federal antitrust laws, including § 2 of the Sherman Act and § 7 of the Clayton Act. Namely, when a private party claims monetary relief under the antitrust laws, as here, § 4 of the Clayton Act permits recovery by any person "injured in his [or her] business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (brackets supplied).

Despite the broad language of § 4, the courts have limited a private party's right to bring an antitrust action through restrictions on standing. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n. 14, 92 S.Ct. 885, 892 n. 14, 31 L.Ed.2d 184 (1972) (stating that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation"). The Eleventh Circuit traditionally has employed the two-pronged target area test to determine if a plaintiff has antitrust standing.[4] *Municipal*

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[4] In *Associated Gen. Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 536-45, 103 S.Ct. 897, 907-912, 74 L.Ed.2d 723 (1983), the Supreme Court of the United States set forth a flexible, case-by-case standard for resolving an antitrust standing issue and emphasized that courts should consider the following factors: (1) a causal connection between an antitrust violation and harm to the plaintiff, (2) an intent by the defendants to cause the harm, (3) the existence of an antitrust injury, (4) the directness of a causal link between the injury and the market restraint, (5) the speculative nature of the damages, and (6) the risk of duplicate recoveries or complex apportionment of damages.

Subsequently, in *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1496 (11th Cir.1985), *cert. denied*, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986), the Eleventh Circuit held that the target area test "does not produce results materially different

Utils. Bd. of Albertville, 934 F.2d at 1499. The first step is to determine whether the plaintiff has suffered antitrust injury. *Id.* The Supreme Court has defined "antitrust injury" as an

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1997) (citations omitted). While the Supreme Court's definition is somewhat obscure in application, it is clear that a plaintiff "must prove more than injury causally linked to an illegal presence in the market." *Id.*

The second prong of the Eleventh Circuit's standing test is to determine whether the plaintiff is an efficient enforcer of the antitrust laws. *Municipal Utils. Bd. of Albertville*, 934 F.2d at 1499. In other words, a plaintiff must "prove that he [or she] is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry" and "be the target against which anticompetitive activity is directed." *National Ind. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602, 608 (11th Cir. 1984), *cert. denied*, 474 U.S. 1013, 106 S.Ct. 544, 88 L.Ed.2d 473 (1985) (brackets supplied).

In sum, the primary purpose of the standing requirements is to assure that the injuries alleged are not "merely

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from the results obtained in" *Associated Gen. Contractors. Id.* at 1520; *See also Mr. Furniture v. Barclays Am./Commercial, Inc.*, 919 F.2d 1517, 1520 n. 1 (11th Cir.1990), *cert. denied*, 502 U.S. 815, 112 S.Ct. 68, 116 L.Ed.2d 43 (1991). Accordingly, the court will proceed under the target area test and also will bear in mind the factors set out by the Supreme Court .

indirect, secondary, or remote." *Construction Aggregate Transport, Inc. v. Florida Rock Indus., Inc.*, 710 F.2d 752, 764 (11th Cir.1983) (citation omitted). That is, standing "safely limit[s] the class of potential plaintiffs to those persons who will most adequately vindicate the purposes of the antitrust laws." *Id.* at 762-63 (citation omitted); *see also Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 394 (7th Cir. 1933) ("Given the potential scope of antitrust violations and the availability of treble damages, an overbroad reading of § 4 could result in 'overdeterrence,' imposing ruinous costs on antitrust defendants, severely burdening the judicial system, and possibly chilling economically efficient behavior."), *cert. denied*, —— U.S. ——, 114 S.Ct. 1054, 127 L.Ed.2d 375 (1994).

C. Analysis

To paraphrase, Count I asserts that Monsanto's acquisition of Ortho and subsequent termination of Florida Seed's distributorship agreement was part of a scheme to "preserve or expand" Monsanto's monopoly in the residential non-selective herbicide market by destroying the marketability of its competitor product, Kleenup, all in violation of § 2 of the Sherman Act. Pl.s' Compl. at ¶ 34. According to the plaintiffs, Monsanto illegally took advantage of its short-term control of both Roundup and Kleenup and commenced anticompetitive actions to impair Kleenup's marketability by stifling the distribution channels for that product. The termination of Florida Seed's distributorship agreement was a monopolistic act aimed directly at Florida Seed because, according to the plaintiffs, the best way to squelch the distribution channels of Kleenup was to terminate effective distributors, such as Florida Seed.

The plaintiffs also allege that under § 2 of the Sherman Act, Monsanto's conduct constitutes monopoly leveraging, which involves "using a monopoly in one market to gain

a competitive advantage in a second, where the purpose is not to monopolize or attempt to monopolize the second market." *Multistate Legal Studies v. Harcourt Brace Publ.*, 63 F.3d 1540, 1551 n. 8 (10th Cir.1995).[5] The allegations contained in Count II are as follows:

> Monsanto's acquisition of Ortho has had and will have the effect of substantially lessening competition or tending to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act. . . . But for the illegal acquisition, Florida Seed would not have been terminated as a distributor of Ortho products including Kleenup, and Florida Seed would have retained its ability to sell lawn and garden products to large retail chain accounts and to continue to participate in [National] Prime Source.

Id. at ¶ 36 (brackets supplied).

In determining whether the plaintiffs have antitrust standing, the court must assume that Monsanto has violated § 2 of the Sherman Act and § 7 of the Clayton Act. *See Mr. Furniture*, 919 F.2d at 1520 n. 2. The primary argument raised by Monsanto is that Florida Seed does not have standing to challenge an alleged illegal acquisition at the manufacturing level because Florida Seed is neither a competitor or consumer in the relevant market, which according to Monsanto is limited to the manufacture of residential non-selective herbicides. Generally, but not always, a plaintiff must be either a consumer or competitor in the relevant market, or the injury likely will be too remote from the alleged violation. *See Associated Gen. Contractors*, 459 U.S. at 539, 103 S.Ct. at 909.

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[5] There is a split among the circuits as to whether monopoly leveraging is illegal and, thus, whether such a claim can be asserted as a cause of action under § 2 of the Sherman Act. *See Multistate Legal Studies*, 63 F.3d at 1551 n. 8; *Advanced Health-Care Serv. v. Radford Com. Hosp.*, 910 F.2d 139, 149 (4th Cir.1990); *Return on Investment Systems v. Translogic Corp.*, 702 F.Supp. 677 (N.D. Ill.1988). The court need not confront this issue, however, because as discussed, *infra*, the plainitffs lack standing to bring a claim under the federal antitrust laws.

Monsanto correctly points out by way of numerous case citations that distributors terminated after illegal mergers of manufacturers usually lack standing to sue under the antitrust laws. For example, Monsanto relies on *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir.1977). There, the defendant, Olympia, acquired Hamm's brewing and terminated Hamm's distributors, including the plaintiff, Lenore. Lenore sued Olympia, alleging that the acquisition violated § 7 of Clayton Act because it substantially lessened competition. The district court granted summary judgment in favor of Olympia, and the Ninth Circuit affirmed. The Ninth Circuit looked to *Brunswick, supra,* and held that Lenore did not have standing to sue because it had not suffered antitrust injury:

> Even though Lenore's injury may have ". . . occured 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisition unlawful." The terminations were an "incidental matter which the merger may have made possible, but certainly did not cause." All Lenore really alleges is that because Olympia purchased the Hamm's brand, Lenore was replaced in favor of other distributors. This is insufficient to make out a case under § 7 which is concerned with competition, not competitors.

550 F.2d at 500 (internal citations omitted). In sum, the court determined that the acquisition of Hamm violated the antitrust laws, if at all, because competiton was reduced in the manufacture of beer, a market in which Lenore was neither a competitor or consumer.

In a similar case relied upon by Monsanto, *G.K.A. Beverage Corp. v. Honickman,* 55 F.3d 762 (2nd Cir. 1995), *cert. denied,* —— U.S. ——, 116 S.Ct. 381, 133 L.Ed.2d 304 (1995), the Second Circuit analyzed terminated distributors' ability to obtain standing under § 2 of the Sherman Act. The plaintiffs were a group of

former soft drink distributors for Seven-Up Brooklyn. They brought antitrust claims against several defendants, including Honickman, the latter of whom sought to acquire Seven-Up Brooklyn. Honickman and Seven-Up Brooklyn were two of the three soft drink bottling companies in New York City. Without including the Seven-Up brands, Honickman controlled more than one-half of the soft drink sales to retailers in New York City.

Honickman provided financing to its various affiliates for the purchase of Seven-Up Brooklyn, a transaction that gave rise to an FTC investigation. When the FTC disallowed the acquisition asserting antitrust violations, the plaintiffs claimed that Honickman and the other defendants conspired to cause Seven-Up Brooklyn to file for bankruptcy. If Seven-Up Brooklyn filed for bankruptcy, then according to the plaintiffs, Honickman could reacquire it under the failing company defense and avoid repercussions under the federal antitrust laws. This is in fact what happened.

The Second Circuit held that the plaintiffs' injuries were derivative only and failed to rise to a level of antitrust injury sufficient to confer standing:

> If Seven-Up Brooklyn, before its bankruptcy, had canceled its distribution agreements and hired delivery drivers as employees, the distributors would not have been able to assert an antitrust violation. Lacking such a claim against Seven-Up Brooklyn, the distributors also lack a claim against Honickman [and the other defendants] who, having taken over Seven-Up Brooklyn's business, have not hired the plaintffs as distributors.
>
> Although the distributors undoubtedly suffered injury as a result of the alleged antitrust violation, the injury suffered by the distributors is derivative of the injury suffered by Seven-Up Brooklyn. Thus, accepting the antitrust allegations as true, it was not the distributors that suffered direct antitrust injury,

> but Seven-Up Brooklyn. Therefore, the proper party to bring the antitrust action on these facts was Seven-Up Brooklyn, or, after its bankruptcy, the estate's trustee.

Id. at 767; *see also Universal Brands, Inc. v. Philip Morris, Inc.*, 546 F.2d 30 (5th Cir.1977) (denying subdistributor standing to enjoin a merger when its exclusive distributor was replaced after a merger).

The court finds that the same result is required in this case. While Florida Seed's injuries undoubtedly resulted from the termination of its distributorship agreement for Kleenup, the court finds that the injury sustained is too remote. If Ortho, prior to Monsanto's acquisition, had terminated Florida Seed, Florida Seed could not have attacked as illegal Ortho's decision. The same would be true if after divesture of the Kleenup assets, the purchasing company had not retained Florida Seed as a distributor.

In making its finding, the court further assumes that Monsanto's goal was to gain control of the non-selective herbicide market and that Florida Seed was an effective distributor. However, even assuming such, the court finds that the damages claimed by the plaintiffs (loss of competition at the distributor level) are not the type of anti-competitive injury that the antitrust laws were intended to remedy. The court finds that if the merger is illegal, the illegality stems from decreased competition in the manufacture of residential non-selective herbicides.

The court, after carefully examining the law, cannot find any cases, nor have the plaintiffs cited any, that would warrant a contrary finding. In fact, the cases relied on by the plaintiffs are inapposite. For example, the plaintiffs rely on *DeLong v. Washington Mills Electro Min.*, 990 F.2d 1186 (11th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 604, 126 L.Ed.2d 569 (1993), for the proposition that a manufacturer's short-term control over intra-

brand competition gives a terminated dealer standing. The *DeLong* court, however, held that a distributor had standing where the manufacture terminated the distributorship because the distributor objected to a price-fixing conspiracy directed towards the consumer. Quite a different fact scenario is present here.

The difficulties that a terminated distributor may face in obtaining standing to contest an illegal merger are explained in P. Areeda & H. Hovenkamp, Antitrus Law ¶ 381 (rev. ed. 1995) (internal footnotes omitted) (brackets supplied):

> Many mergers have been challenged by suppliers (including dealers, franchisees, and employees providing the merging firms with distribution and other services) displaced as a result of the merger. Injury-in-fact may be doubtful when equivalent opportunities are available elsewhere. If other opportunities do not exist [as alleged by Florida Seed] displaced suppliers made redundant by a merger suffer actual losses but not antitrust injury, for the rationale for condemning a merger lies in its potential for supra-competitive pricing, not in its potential for cost savings and other efficiencies. A merger that actually brings about supracompetitive prices and diminished output reduces the need for inputs and can therefore injure suppliers. Although such an injury connects more closely with the rationale for finding a violation, it is still not antitrust injury because it is neither the means by which output is restricted nor the direct concern of antitrust rules protecting product market competition.

The plaintiffs, on the other hand, argue that as a wholesale distributor to retail consumers, Florida Seed competes with manufacturers, such as Monsanto, which also engage in direct sales to retail consumers. Hence, according to the plaintiffs, the relevant market encompasses the marketing and selling of residetial non-selective herbicides, in addition to manufacturing. The court agrees

with the plaintiffs that at this stage of the litigation, the factual allegations with respect to the relevant markets must be accepted as true. *See Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir.1982); *see also Construction Aggregate Transport, Inc.*, 710 F.2d at 764 (recognizing that more than one "sector of the market may be the target for a particular anticompetitive act"). Nonetheless, the court is not persuaded by the plaintiffs' argument. In *Honickman*, the Second Circuit rejected this " 'distribution monopoly' " argument:

> The distributors attempt to recharacterize their antitrust claims by arguing that they suffered antitrust injury in the elimination of competition in retail distribution between themselves and Honickman. However, the so-called "distribution monopoly" is derived entirely from Honickman's share of the bottling market. Honickman's "distribution monopoly" thus involves only his product. Moreover, a vertically structured monopoly can take only one monopoly profit. *See Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 318 (D.C.Cir.1983); *see also* Robert H. Bark, The Antitrust Paradox 229 (2d ed. 1993); 3 Philip Areeda & Donald F. Turner, Antitrust Law 21 725b (1978).

55 F.3d at 767.

In the alternative, Florida Seed argues that, at the very least, it is a potential competitor in the manufacturing arena. The court is not persuaded by this argument either. The court recognizes that a plaintiff who was never in a market, here the manufacturing market, sometimes can suceed on a claim that he or she would have entered it had the defendant's antitrust violation not kept him or her out. To state such a claim, the plaintiff must show a financial ability to enter the market, the appropriate background and experience that makes success possible and steps evidencing an intent to enter the market. *See In re Dual Deck Video Cassette Recorder Antitrust Litigation*, 11 F.3d 1460, 1465 (9th Cir.1993); *Great Western Direc-*

tories, Inc. v. Southwestern Bell Tel. Co., 63 F.3d 1378, 1389 (5th Cir. 1995).

Admittedly, Florida Seed's inability to manufacture residential non-selective herbicides is directly attributable to the prohibitive contractual clauses contained in its distributorship agreements with Monsanto and Ortho. Florida Seed, however, has not pointed to any authority indicating that such a restriction is illegal in an antitrust sense or that the factors recited in *Dual Deck Video Cassette* need not be proven when such a clause has prohibited market entry. In fact, it appears that Florida Seed would not have complained of its inability to enter the market if its distributorship agreements had not been terminated.

Florida Seed continued by arguing that its assertion that it is a potential competitor, in and of itself, is sufficient to confer standing because at this stage all factual assertions must be taken as true. The court, however, need not and should not adopt in totum conclusory allegations. In other words, a motion to dismiss cannot be defeated with "conclusory allegations . . . if not supported by facts constituting a legitimate claim for relief. . . ." *Municipal Utilities Bd. of Albertville*, 934 F.2d at 1495; *see also Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir.1985). Here, the plaintiffs have not alleged the existence of any of the *Dual Deck Video Cassette* factors, which the court must examine to assess a company's preparedness to enter a market. The complaint is devoid of any facts that Florida Seed had a genuine intent to enter the market and a preparedness to do so. In other words, the court finds that there is no set of facts by which Florida Seed can show that it is a potential competitor.

Even if the court were to find that Florida Seed suffered antitrust injury, this finding alone cannot confer standing, because "only those parties who can most efficiently vindicate the purposes of the antitrust laws have antitrust standing to maintain a private action under § 4." *In re Indus-*

trial Gas Antitrust Litigation, 681 F.2d 514, 516 (7th Cir.1982), *cert. denied*, 460 U.S. 1016, 103 S.Ct. 1261, 75 L.Ed.2d 487 (1983). The court finds that other more direct victims exist. If Monsanto is in fact squelching the marketability of its competitor products, the company who acquired the Kleenup assets or another manufacturing company in the same market would be a more appropriate plaintiff. Likewise, consumers of residential non-selective herbicides could maintain an action if Monsanto's action stifled competition allowing Monsanto to engage in monopoly pricing in retail stores. *See generally SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39 (1st Cir. 1995). In other words, a finding that Florida Seed has standing to bring an antitrust lawsuit could potentially open the litigation floodgates to all distributors terminated as a result of the alleged illegal merger. The focus of the litigation would then be on the individual injuries and not the damages suffered by the public as a whole.

The discussion, thus far, has focused on whether Florida Seed has standing to assert antitrust claims. Frit likewise cannot bring this action, because stockholders do not have standing to bring an action on behalf of their subsidiary. *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 710 (11th Cir.1984); *Haris v. Shell Oil Co.*, 371 F.Supp. 376, 377 (M.D.Ala. 1974) ("The fact that the sole stockholder may not recover damages under the antitrust laws for losses of his [or her] corporation had long ago been decided in this jurisdiction. . . .") In *Harris*, the court explained the reasoning for denying standing to stockholders and related entities:

> The theory is that, if each creditor, shareholder or other person with some damage derived or reflecting from the damage to the corporation initially injured by the antitrust violations, had standing to assert treble-damage claims for such injuries, the court would be flooded with a multiplicity of suits, and the

> defendant would be subject to multiple liability for the same alleged wrongs.

Id. at 379.

The plaintiffs, however, argue that Frit does not seek a double recovery or independent standing in its capacity as a shareholder but rather joins with Florida Seed in vindicating the alleged violations of the antitrust laws. The plaintiffs have not cited any authority for allowing Frit to unite with Florida Seed, nor has the court found any. Under the antitrust laws, Florida Seed is capable, in and of itself, of bringing an antitrust action, assuming of course that the standing requirements are satisfied. To the extent Frit seeks to join forces with Florida Seed, the court finds that the addition of Frit is merely duplicative. Therefore, Frit is not a proper party to the federal antitrust claims. Accordingly, Monsanto's motion to dismiss for lack of standing as to the plaintiffs' claims under § 2 of the Sherman Act and § 7 of the Clayton Act is due to be granted.

II. State Law Claims

In granting Monsanto's motion to dismiss, the only claims now remaining are those brought pursuant to state law. Because diversity-of-citizenship jurisdiction is present in this case, the court will retain jurisdiction over the remaining causes of action.

ORDER

For the reasons stated herein, it is CONSIDERED and ORDERED that defendant Monsanto Company's motion to dismiss the federal antitrust claims under § 2 of the Sherman Act (Count I) and § 7 of the Clayton Act (Count II) be and the same is hereby GRANTED. The action will continue as to the state-law claims asserted in Counts III, IV, and V of the complaint.

APPENDIX C

[Filed Apr. 24, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6080

FLORIDA SEED COMPANY, INC., a corporation,
FRIT INDUSTRIES, INC., a corporation,
Plaintiffs-Counter,
Defendants-Appellants,

versus

MONSANTO COMPANY, a corporation,
Defendant-Counter-
Claimant-Appellee.

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT and DUBINA, Circuit Judges, and STAGG,* Senior District Judge.

PER CURIAM:

The Petition(s) for rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

---

* Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

APPENDIX D

Sherman Act Section 2, 15 U.S.C. § 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX E

Clayton Act, Section 4(a), 15 U.S.C. § 15(a):

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Supreme Court, U.S.
FILED
SEP 9 1997
CLERK

No. 97-155

In The

Supreme Court of the United States

October Term, 1996

FLORIDA SEED COMPANY, INC., *et al.*,

Petitioners,

vs.

MONSANTO COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD A. KLEINE
Assistant General Counsel
MONSANTO COMPANY
800 N. Lindbergh Boulevard
St. Louis, Missouri 63167
(314) 694-3720

KENNETH A. LETZLER
Counsel of Record
JONATHAN I. GLEKLEN
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

JOHN M. JOHNSON
LIGHTFOOT, FRANKLIN,
& WHITE, L.L.C.
300 Financial Center
505 20th Street North
Birmingham, Alabama 35203
(205) 581-0700

Attorneys for Respondent

QUESTION PRESENTED

Whether a distributor whose contract is not renewed following the acquisition of its supplier lacks standing under the antitrust laws because it has not suffered antitrust injury.

PARTIES TO THE PROCEEDING BELOW

Respondent incorporates by reference Petitioners' list of parties to the proceeding below.

RULE 29.6 LIST

Monsanto Company has no parent company. Its non-wholly owned subsidiaries are:

3128156 Canada Inc. (D/B/A Flexsys Company)
Advanced Elastomer Systems Hong Kong Limited
Advanced Elastomer Systems Japan Limited
Advanced Elastomer Systems Limited
Advanced Elastomer Systems Marketing Pte. Ltd.
Advanced Elastomer Systems NV/SA
Advanced Elastomer Systems Singapore PTE. Ltd.
Advanced Elastomer Systems, Canada, Inc.
Advanced Elastomer Systems, Inc.
Advanced Elastomer Systems, L.P.
Alginate Industries Limited
Alginate Industries (Ireland) Limited
Alginate Industries (Scotland) Limited
Arramara Teoranta
Complejo Asgrow Semillas, S.A.
D & M International, L.L.C.
Deutsche Advanced Elastomer Systems Gmbh
Flexsys Additive Fur Die Kautschuk Industrie Gmbh & Co. Kg
Flexsys Additive Fur Die Kautschuk Industrie Verwaltungs Und Beteiligungs Gmbh
Flexsys America Co.
Flexsys America L.P.
Flexsys A. B.
Flexsys Holding B. V.
Flexsys Industria e Comercio Ltda.

RULE 29.6 LIST (Continued)

Flexsys N. V.
Flexsys Rubber Chemicals S. L.
Flexsys R. V.
Flexsys S.P.A.
Flexsys (Pte.) Ltd.
Fosbrasil S.A.
Hebei Ji Dai Cotton Seed Technology Company, Ltd.
Hybritech Europe Snc
Kelco Biospecialties Limited
Kelco Company
Kelco International Gmbh
Kelco International Limited
Kelco International Pension Fund Trust Limited
Kelco Specialty Colloids (S) Pte. Ltd.
Kelp Industries Pty. Limited
Korag Company Limited
Kumho Monsanto Inc.
Monsanto Agricola De Nicaragua
Monsanto Chemical Company Limited, Suzhou
Monsanto Chemicals Of India Limited
Monsanto (Malaysia) Sendirian Berhad
Monsoy S/A
Montor Performance Plastics Co.
PT Monfori Nusantara
Quimica M S.A. De C.V.
Rubiatec Sendirian Berhad
Thailon Six Six Limited
The NutraSweet Company
The WellBridge Company
Zooagro De Venezuela, C.A.

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No. 97-0155

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

FLORIDA SEED COMPANY INC., *et al.*,
Petitioners,

v.

MONSANTO COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent Monsanto Company respectfully opposes the Petition for Writ of Certiorari. This case presents a recurring fact pattern -- a distributor that has lost a line of goods following a merger of its supplier and claims standing to challenge the merger under the antitrust laws. The Eleventh Circuit resolved that issue in a decision that is consistent both with every one of the numerous courts that have previously addressed the question and with the precedent of this Court. Accordingly, no question worthy of *certiorari* is presented.

OPINIONS BELOW

Respondent incorporates by reference Petitioners' statement of opinions and judgments below.

JURISDICTION

Respondent incorporates by reference Petitioners' statement of jurisdiction.

STATEMENT OF THE CASE

A. *Factual Background*

This case arises out of Respondent Monsanto Company's acquisition of the Ortho Lawn and Garden business from Chevron Corporation. After the Federal Trade Commission permitted the acquisition to proceed (as described below), Monsanto undertook a review of Ortho's distribution agreements and made a "strategic decision to use fewer distributors." R1-1-15[1]. As a result of the review, Monsanto elected not to renew the distribution agreement of Petitioner Florida Seed, a wholesale distributor of lawn and garden products. *Id.* Thereafter Florida Seed sued, alleging that the acquisition was a "but for" cause of the loss of its distributorship and challenging both the Ortho acquisition and Monsanto's non-renewal of the distribution contract as violative of the Clayton Act and the Sherman Act. R1-1-20.

As noted, Monsanto's acquisition of Ortho was reviewed by the Federal Trade Commission pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390 (1976) (codified as amended at 15 U.S.C. § 18a (1994)). R1-1-6-8. Although Ortho markets some 200 lawn and garden products, the FTC perceived competitive issues as to only one Ortho product, a nonselective herbicide called Kleenup. R1-1-7. *See also In re Monsanto Co.*, 58 Fed. Reg. 30060 (1993) ("Consent

---

[1] Citations to the record refer to the volume, the document (tab) number and the page of the record maintained by the district court clerk's office. Thus, R1-1-15 is volume 1, tab 1, p. 15. All citations to R1-1 are to Petitioners' Complaint.

Decree"). Kleenup is based on a patented active ingredient, glyphosate, that Ortho purchased from Monsanto. R1-1-3, 7. Monsanto uses the same active ingredient in its product, Roundup. *Id.*

Without admitting a violation of law, Monsanto entered into a consent decree with the FTC agreeing to divest to a suitable purchaser the trademark "Kleenup" and to sell a significant volume of the active ingredient (plus manufacturing know-how and certain regulatory approvals and filings) on a time schedule acceptable to the FTC.[2] R1-1-7. The Consent Decree contained no "hold separate" provision. Rather, Monsanto was free to control the Kleenup assets -- including *inter alia* the price and marketing of Kleenup -- as long as it maintained the "viability and marketability" of the assets to be divested. R1-1-7. The district court properly took judicial notice of the fact that, after Plaintiffs' Complaint was filed, Monsanto complied with the Consent Decree's divestiture requirement by selling the "Kleenup assets" to Platte Chemical Company, a subsidiary of ConAgra, Inc. (13a). ConAgra is a Fortune 500 company with 1996 revenue in excess of $24 billion.

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[2] In agreeing to the consent decree, Monsanto made clear that it did not admit that its acquisition of the Ortho business would offend the antitrust laws. *See* 58 Fed. Reg. 30,060, 30,061 (1993). Indeed, absent a settlement, the FTC would have faced a formidable task in explaining how the acquisition enhanced Monsanto's market power given that Monsanto's patent on glyphosate, the active ingredient in Kleenup, extended through the year 2000 (R1-1-5), while Ortho's contract to buy glyphosate ran only through September 30, 1994. In other words, there is no reason to believe that Monsanto had not, via its glyphosate supply contract, already reaped any economic power that inhered in the glyphosate patent through September 30, 1994, and no reason to believe that, if the acquisition had not gone forward, Ortho Kleenup would have been a viable competitor after that date. Rather, by not executing a new glyphosate supply contract, Monsanto would have put Ortho in the mode of winding up its Kleenup business starting no later than October 1994. In other words, the FTC consent did more than retain the status quo; it in fact enhanced competition for residential nonselective herbicides.

Monsanto's decision not to renew Florida Seed's Ortho distribution contract applied to all 200 products in the Ortho line, not just the Kleenup product Monsanto was required to divest. Petitioners nonetheless claim that Monsanto's refusal to renew Florida Seed's distributorship was part of a scheme to frustrate the divestiture agreed to in the Consent Decree. R1-1-19. Petitioners, however, allege only injury to themselves. R1-1-18. The Complaint contains no allegation that the Ortho acquisition or the non-renewal of Florida Seed's contract resulted in higher prices for consumers or reduced output. Specifically, there is not, and could not be, any allegation that retailers have been unable to obtain Kleenup from distributors other than Florida Seed.

B. *The Proceedings Below*

In early 1994 Respondent made demand on Florida Seed's sole shareholder, Petitioner Frit Industries ("Frit"), for money due and owing on a guaranty Frit had issued for all indebtedness owed by Florida Seed. R1-1-16. In response to Monsanto's demand for payment, on May 2, 1994, Petitioners filed this action against Monsanto in the United States District Court for the Middle District of Alabama. Petitioners asserted violations of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1994), Section 7 of the Clayton Act, 15 U.S.C. § 18 (1994), and state law claims. R1-1. *Florida Seed Co., Inc. and Frit Indus., Inc. v. Monsanto Co.* (No. 94-D-514-N). R1-1

Monsanto responded to the Complaint by counterclaiming for the $2,600,000 owed by Florida Seed on an open account and guaranteed by Frit. Monsanto at the same time moved to dismiss Petitioners' federal antitrust claims on grounds that they lacked standing to assert such claims. R1-5. On November 9, 1995, Judge Ira DeMent issued a Memorandum and Order granting Monsanto's Motion to Dismiss. (Pet. App. B). The court held both that Petitioners had not alleged antitrust injury and that any injury they suffered was "too remote" for them to be granted standing. (22a). Indeed, the district court noted that, "after

carefully examining the law" it "cannot find any cases, nor have plaintiffs cited any, that would warrant a contrary finding." *Id.*

At Petitioners' request, the district court entered a partial final judgment pursuant to Fed. R. Civ. P. 54(b) against Petitioners on their antitrust claims, permitting an immediate appeal. R1-30. After briefing and oral argument, on February 8, 1997 Judge Tjoflat wrote for a unanimous panel of the United States Court of Appeals for the Eleventh Circuit affirming the district court opinion. (Pet. App. A). The court of appeals recognized that, consistent with this Court's precedent, "courts have consistently denied standing to distributors who were terminated, or whose contracts were not renewed, following a merger." (6a). Because neither Florida Seed nor Frit had suffered antitrust injury, the court did not address whether either would be an efficient enforcer of the antitrust laws. (7a). In its conclusion, the court of appeals dismissed Petitioners' antitrust action as "a mundane commercial case, in which a buyer has used the antitrust laws to postpone paying its debts." (8a).

Petitioners filed a Petition for Rehearing and Suggestion of Rehearing *En Banc* on March 11, 1997, which was denied on April 24, 1997. No judge in regular active service on the Eleventh Circuit requested that the Court be polled regarding rehearing *en banc*. (Pet. App. C).

REASONS FOR DENYING THE WRIT

None of the "compelling reasons" that this Court has required for *certiorari* are present in this case. S.Ct. Rule 10. Rather, this case presents a recurring fact pattern: a distributor is terminated (or not renewed) when its supplier is acquired by a competitor. Each of the numerous decisions addressing these circumstances has reached the same result as the court below: the disgruntled former distributor has no standing under the antitrust laws to attack the acquisition or the non-renewal that follows it.

Petitioners' response to the uniformity of this case law is citation to, and out of context quotation from, cases that do not involve distributor terminations (or non-renewal) following a merger, cases unrelated to the "antitrust injury" inquiry, and cases involving alleged conspiracies in violation of the antitrust laws rather than the unilateral conduct alleged here. Nor can Petitioners rely on what they characterize as Monsanto's "temporary control of a competing brand" based on the requirements of the FTC consent decree to distinguish those cases finding no standing. Any abuse of the so-called "temporary control" of Kleenup is less an intrusion on competition than the permanent control of market power alleged in a typical merger case, where the case law uniformly concludes that former distributors lack standing. Moreover, the decisions of this Court and the lower courts make clear that only the FTC would have standing to challenge Monsanto's conduct if it violated the decree.

I. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS OR CONFLICT WITH THE DECISIONS OF THIS COURT.

A. Every Court To Address The Issue Has Held That Distributors Terminated After A Merger Have Not Suffered Antitrust Injury.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977), this Court recognized that:

> Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects.

Plaintiffs who allege injury from the "economic readjustments" which result from a merger, rather than "injury of the type that the antitrust laws were intended to

prevent and that flows from that which makes the defendants' acts unlawful," have not suffered "antitrust injury" and may not sue under the antitrust laws. *Id.* at 489. *See also Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 345 (1990) (denying standing where injury was not caused by the "anticompetitive effects" of the challenged conduct).

The antitrust injury inquiry serves a vital gatekeeper role by protecting both defendants and the courts against parties who are not "seeking to vindicate the public interest as a private attorney general at all, but to obstruct competition . . . ." Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 334.2 at 409 (1993 Supp.). While this Court has not directly addressed the question of the standing of a former distributor to attack an acquisition and its aftermath, the Second, Fifth, and Ninth Circuits, numerous district courts, and the leading antitrust commentators all agree with the Eleventh Circuit that such distributors lack standing to sue under the antitrust laws. Former distributors have not suffered antitrust injury because they are not "seeking to vindicate the public interest," but only their own.[3]

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[3] Petitioner Frit Industries is not a distributor itself, but only the sole shareholder of a distributor -- Petitioner Florida Seed. Although Frit is identified as a party "whose judgment is sought to be reviewed," S.Ct. Rule 14.1(b), the Petition does not argue that the Court of Appeals erred in affirming dismissal of Frit's claims on the grounds that the Complaint alleges injury only to Florida Seed, rather than direct injury to itself. Because the question presented explicitly addresses only distributors (such as Florida Seed), not their shareholders, Respondent assumes that Petitioners are not seeking reversal of the dismissal of Frit's claims. Monsanto nonetheless notes that the courts are unanimous that shareholders, even sole shareholders like Frit, lack standing under the antitrust laws to sue for damage to their corporations. *See, e.g., Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1375 (9th Cir. 1996), *cert. denied* 117 S.Ct 1252 (1997); *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 766 (2nd Cir.), *cert. denied*, 116 S.Ct. 381 (1995), *Lovett v. General Motors Corp.*, 975 F.2d 518 (8th Cir. 1992), *rev'd in part on other grounds*, 998 F.2d 575 (8th Cir. 1993); *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1378 (7th

In *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977), the leading case on this topic, defendant Olympia Brewing acquired Hamm's Brewing and terminated Hamm's distributors, including the plaintiff, Lenore. The Ninth Circuit rejected on standing grounds Lenore's argument that the acquisition violated Section 7 of the Clayton Act and that its termination constituted an attempt to monopolize under Section 2 of the Sherman Act:

> Even though Lenore's injury may have " . . . occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful." [citing *Brunswick*, 429 U.S. at 489.] The terminations were an incidental matter which the merger may have made possible, but certainly did not cause.

550 F.2d at 500. *Accord Sierra Wine & Liquor Co. v. Heublein, Inc.*, 626 F.2d 129 (9th Cir. 1980) (same). The Second Circuit recently reached the same result in *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762 (2d Cir.), *cert. denied*, 116 S.Ct. 381 (1995), denying standing to distributors asserting monopolization claims based on their termination after an acquisition they alleged to be illegal.[4]

Cir. 1987); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2nd Cir. 1986); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 710 (11th Cir. 1984); *Central Nat'l Bank v. Rainbolt*, 720 F.2d 1183, 1186 (10th Cir. 1983); *Meyer Goldberg, Inc. of Lorain v. Goldberg*, 717 F.2d 290, 294 n. 2 (6th Cir. 1983); *Deaktor v. Fox Grocery Co.*, 475 F.2d 1112, 1115 (3d Cir. 1973); *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1957). *See also Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910), *cited with approval in Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534 (1983).

[4] One of the questions presented in the *GKA Beverage* Petition for Writ of Certiorari denied by this Court was essentially identical to the question presented by Petitioners here: "Do exclusive distributors of soft drinks with a vested interest in the brands made by the bottler and who were also one of the two targets of the anticompetitive conduct, suffer sufficient

The Eleventh Circuit's decision below also follows Fifth Circuit precedent denying standing to a distributor terminated after a merger it alleged to be illegal. *Universal Brands, Inc. v. Philip Morris, Inc.*, 546 F.2d 30, 34-35 (5th Cir. 1977) (same).

As noted, *every* district court to address the question presented here has found no standing to sue under the antitrust laws as well. *See Return on Inv. Sys. v. TransLogic Corp.*, 702 F. Supp. 677, 679 (N.D. Ill. 1988) (§ 2 and § 7 claims of distributor terminated after acquisition); *Bryant Heating & Air Conditioning Corp. v. Carrier Corp.*, 597 F. Supp. 1045, 1051-53 (S.D. Fla. 1984) (same); *Tim W. Koerner & Assocs. v. Aspen Labs, Inc.*, 492 F. Supp. 294, 301 (S.D. Tex. 1980) (same), *aff'd*, 683 F.2d 416 (5th Cir. 1982) (table); *Fisher v. Coca-Cola Bottling Co. of Los Angeles*, 1979-1 Trade Cas. ¶ 62,514 (C.D. Cal. 1979) (same); *A.G.S. Elecs., Ltd. v. B.S.R. (U.S.A.), Ltd.*, 460 F. Supp. 707, 708 (S.D.N.Y.) (same), *aff'd*, 591 F.2d 1329 (2d Cir. 1978) (table); *Kirihara v. Bendix Corp.*, 306 F. Supp. 72, 90-91 (D. Haw. 1969) (same). Thus, there is not only no split among the circuits on the Question Presented in the Petition, there is no split among the district courts either. Rather, as noted in *SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39, 43 (1st Cir. 1995), although there is no "black letter" rule for antitrust standing, "there are patterns in the antitrust standing cases that offer considerable guidance," and former distributor standing is one of those settled factual patterns.

Given the unanimity of precedent, it is unsurprising that the leading antitrust commentators agree that terminated distributors lack standing. Professors Areeda and Hovenkamp note in their treatise:

> Many mergers have been challenged by suppliers (including dealers, franchisees, and employees

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direct antitrust injury such that they have standing to assert a violation of the antitrust laws."

> providing the merging firms with distribution and other services) displaced as the result of the merger. Injury-in-fact may be doubtful when equivalent opportunities are available elsewhere. If other opportunities do not exist, *displaced suppliers made redundant by a merger suffer actual losses but not antitrust injury, for the rationale for condemning a merger lies in its potential for supracompetitive pricing, not in its potential for cost savings and other efficiencies.* A merger that actually brings about supracompetitive prices and diminished output reduces the need for inputs and can therefore injure suppliers. Although such an injury connects more closely with the rationale for finding a violation, it is still not antitrust injury because it is neither the means by which output is restricted nor the direct concern of antitrust rules protecting product market competition.

II Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 381a (rev. ed. 1995) (emphasis added).

B. The Cases Uniformly Holding That Distributors Terminated After A Merger Have Not Suffered Antitrust Injury Are Consistent With This Court's Precedent.

None of the former distributor standing cases cited above has even considered the possibility that precedent from this Court required a contrary result. This uniform view is clearly correct. This Court has never suggested that injury to distributors following a merger is "injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. Rather, the vice of both mergers and monopolization is higher prices and reduced output. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 n.13

(1990). *Accord* Areeda & Hovenkamp, *supra*. Here, Petitioners complain not about such high prices or reduced output -- indeed their Complaint is silent regarding the existence of these effects -- but the loss of their distributorship contract. Accordingly, Petitioners are not complaining of antitrust injury.

Petitioners' invocation of *Associated Gen. Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) is misplaced. First, none of those cases deal with the Question Presented or even with the issue of terminated distributors. But more fundamentally, the cases are inapposite because they focus primarily on the question of whether a plaintiff who *has* suffered antitrust injury should nevertheless be denied standing because its injury is too indirect, speculative, or remote, or because of the possibility of duplicative recovery. They are of no relevance to Petitioners, who have *not* suffered antitrust injury.[5]

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[5] Petitioners cite *McCready* for the proposition that they have suffered antitrust injury because harm to Florida Seed was "a necessary step in effecting the ends of the illegal conspiracy." Pet. at 11 (citing *McCready*, 457 U.S. at 479). But it was *not* necessary to injure Florida Seed to have exactly the same alleged effect on the market; the same effect could be achieved without injury to Petitioners had Monsanto provided Florida Seed with Roundup rather than Kleenup to distribute. Conversely, Monsanto could have injured Florida Seed but avoided any antitrust concern by terminating Florida Seed and replacing it with a new, vigorous competitor. (Indeed, there is no allegation that Monsanto did not do just that.) *Cf. SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39, 45 (1st Cir. 1995) (even if antitrust laws imposed on the defendant a duty to promote competition, it need not do so utilizing the services of the plaintiff; plaintiff lacked standing because the defendant could simply have used other suppliers without violating the antitrust laws).

C. The Cases Cited By Petitioners To Show A Split Among The Circuits Or That The Decision Below Contradicts The Eleventh Circuit's Own Precedent Are Inapposite.

The cases cited by Petitioners for the proposition that there is a split among the circuits or that the Eleventh Circuit ignored its own precedent all involve facts quite different from those alleged by the Petitioners. Petitioners' argument that they have standing because of Monsanto's alleged "collateral anticompetitive purpose" is misplaced.

First, Petitioners cite *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1030 (2d Cir. 1979), for the principle that termination of a distributor is unlawful if "the manufacturer attempts to exact some collateral anticompetitive advantage." But *Fuchs* stands for no principle applicable here -- where only unilateral conduct is alleged -- because the quoted language is describing when "a [Sherman Act] § 1 conspiracy will arise." *Id.*[6] The "collateral anticompetitive advantage" addressed in *Fuchs* is present where a dealer is terminated to effectuate an unlawful exclusive dealing arrangement or other conspiracy in restraint of trade violative of § 1 of the Sherman Act, 15 U.S.C. § 1 (1994).

Like the *Fuchs dicta*, the vast majority of cases cited by Petitioners in their attempt to manufacture a split among the circuits involve distributors terminated pursuant to an unlawful § 1 conspiracy. *See DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186 (11th Cir. 1993); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979); and *Hewlett Packard Co. v. Arch Assocs. Corp.*, 908 F. Supp. 265 (E.D. Pa. 1995). These

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[6] The full quotation reads, "A § 1 conspiracy will arise, however, where in addition to substituting one distribution system for another the manufacturer attempts to exact some collateral anticompetitive advantage." 602 F.2d at 1030.

cases stand only for the unremarkable proposition that a distributor terminated as part of an effort to enforce an illegal price fixing agreement (the *DeLong Equipment* case) or market allocation agreement (*Hewlett Packard* and *Engine Specialties*) is within the area of the economy threatened by the antitrust violation alleged. *See, e.g., McCready*, 457 U.S. at 479 ("Where the injury alleged is so integral an aspect of the *conspiracy* alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations would be likely to cause.") (emphasis added and internal quotation and citation omitted). None of those cases are applicable here, where only unilateral conduct is involved. *See Sierra Wine & Liquor Co.,* 626 F.2d at 134 (finding no standing where distributor terminated after merger alleged the same "collateral anticompetitive purpose" as Petitioners here -- an alleged desire to monopolize the interbrand market).

Petitioners' heavy reliance on *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795 (8th Cir. 1987) (Pet. at 21-23), is similarly misplaced because it involved a dealer termination in order to effectuate an exclusive dealing agreement violative of § 1. Although the plaintiff was a Hartz distributor, it was also independently a Hartz competitor in the interbrand market whom Hartz attempted to drive out of business. The Eighth Circuit found standing despite the fact that plaintiff was a distributor, not because of it. *Id.* at 803 ("[T]he jury could reasonably have found that Hartz's acts towards GI were . . . designed to destroy a perceived source of competition. That the source of this perceived competition was *also a distributor* of Hartz goods does not *insulate* Hartz's acts from the reach of the antitrust laws.") (emphasis added). Petitioners can find no support in *General Industries* because Florida Seed was not a competitor in the interbrand market allegedly monopolized.[7]

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[7] Petitioners citation of another Eighth Circuit case, *S.D. Collectibles, Inc. v. Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991) (Pet. at 23), is of no

D. Monsanto's "Acquisition And Temporary Control Of A Competing Brand" Does Not Change The Analysis.

Finally, Petitioners assert that this case presents a question worthy of *certiorari* because Florida Seed's distribution contract was not renewed while Monsanto was in what Petitioners characterize as "temporary control" of the Kleenup brand. This "temporary control" of one of the two hundred products distributed by Florida Seed pending Monsanto's divestiture of the Kleenup brand pursuant to the FTC consent decree does not change the analysis.

"[A] well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975). There is no confusion regarding this principle in the lower courts. *See, e.g., Federal Trade Comm'n v. Owens-Corning Fiberglas Corp.*, 853 F.2d 458, 463 (6th Cir. 1988); *Ambook Enters. v. Time, Inc.*, 612 F.2d 604, 612 n.14 (2d Cir. 1979) ("private plaintiffs cannot enforce government consent decrees"). If Monsanto had a "collateral anticompetitive purpose" to frustrate the FTC consent decree by refusing to renew Florida Seed's distributorship, only the

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assistance either because the *holding* of that case actually rejects Petitioners' position. The court there found no standing because the plaintiff, like Petitioners, was not complaining of injury it suffered as a customer or competitor of the defendant. *Id.* at 214. The language quoted from Professor Areeda's treatise (Pet. at 23) regarding standing granted to customers is similarly inapplicable because it does not address the standing of *former* customers who, like Petitioners, are complaining about the loss of their customer status, not injury they suffered as a customer.

FTC has standing to complain.[8] Petitioners cite no authority, and there is none, to the contrary.

Furthermore, if terminated distributors lack standing to challenge an allegedly anti-competitive upstream merger where no promise of a curative divestiture has been made, as held by every court to address the question, *supra* at 6-10, former distributors should fare no better as to standing where the acquirer has agreed to remedy any possible competitive concerns. Indeed, what Petitioners are claiming is that Monsanto rendered the promised divestiture ineffective, and that, despite the FTC consent order, this case is just like the uniform precedent in which distributors were held to lack standing.

II. THE ELEVENTH CIRCUIT'S "TARGET AREA TEST" TO DETERMINE WHETHER A PLAINTIFF IS AN EFFICIENT ENFORCER OF THE ANTITRUST LAWS IS IRRELEVANT.

The Eleventh Circuit denied Petitioners standing because they had not suffered antitrust injury; the court did not need to address whether Petitioners were efficient enforcers of the antitrust laws under that circuit's "target area" case law. Because, as described above, the Eleventh Circuit's holding regarding antitrust injury is clearly in accord with consistent precedent from this Court and the lower courts, the "target area test" used by the Eleventh Circuit to determine whether plaintiffs who have suffered antitrust injury are also efficient enforcers of the antitrust laws who should be granted standing is irrelevant here. Indeed, Petitioners can do no more than assert that "it is curious to note that the Eleventh

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[8] The FTC is fully capable of seeing that parties comply with consent decrees. *See, e.g.*, "Schnucks To Pay $3 Million, Divest Two Additional Stores To Settle FTC Charges Of Running Down Supermarkets Before Divesting" (FTC Press Release), 1997 WL 424944 (July 30, 1997) (describing penalty imposed on party to consent decree that failed to maintain the viability of assets to be divested).

Circuit still maintains its use of the 'target area test' which this Court expressly rejected in *Associated General*, 459 U.S. at 536 n.33." (Pet. at 25). Even if Petitioners were correct that this Court had rejected the target area test, which they are not,[9] "interesting to note" is *not* the test for this Court's discretionary exercise of *certiorari*. S.Ct. Rule 10.[10]

The Eleventh Circuit's conclusion that "if the injury the antitrust laws address -- the power to raise prices and reduce output -- has occurred, the proper parties to challenge Monsanto's acquisition of Ortho are direct purchasers in the non-selective herbicide market," (7a) is fully consistent with the prudential standing factors outlined in *Associated General Contractors*. Under *Associated General Contractors*, a plaintiff should show that it is claiming injury as a customer or competitor in the relevant market. 459 U.S. at 539. But Petitioners are not competitors in the interbrand market, and, while Petitioner Florida Seed is a *former* customer in the relevant market, its complaint relates not to injury as a customer (*i.e.* higher prices or reduced output) but the fact

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[9] *See Associated Gen.*, 459 U.S. at 536 n.33 (refusing to disown the target area test or the results based on them); *McCready*, 457 U.S. at 476 n.12 (case provides "no occasion . . . to evaluate the relative utility of any of these possibly conflicting approaches to the problem of remote antitrust injury."). *See generally* II Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 360 at 200 (rev. ed. 1995) ("[W]e do not fault the lower courts that . . . continue speaking of directness and target areas.").

[10] Petitioners' position in this Court is in stark contrast with its position below. In the Eleventh Circuit Petitioners noted that they "certainly do acknowledge, and have acknowledged (Appellant's Brief at 17), that this Court's target area test does not produce results substantially different from the multi-factor test espoused by the Supreme Court in [*Associated General Contractors*]." Reply Brief of Plaintiffs-Appellants at 22. *Cf. Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

that it is no longer a customer. This is not the customer standing contemplated by this Court.

Finally, despite Petitioners' protestations, there is no "wrong without a remedy" here. If Monsanto has engaged in illegal monopolization which has allowed it to raise prices and decrease output, its remaining distributors -- who would be forced to pay the higher prices and who would suffer from lower sales if the increased prices were passed on to consumers -- would be injured and would have standing.[11] And, as noted, the FTC has standing to challenge any alleged violation of the consent decree.

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[11] Petitioners miscite *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. at 337, for the proposition that the remaining distributors will lack standing because they "stand to gain from any conspiracy to raise the market price." (Pet. at 28). The language they cite explains why the price-increaser's *competitors* lack standing. Monsanto's distributors, which are not its competitors, would be injured by price increases and *would* have standing.

CONCLUSION

Petitioners have failed to identify any true conflict between the decision of the Eleventh Circuit and the holding of any other court, including this Court. The petition raises no question worthy of *certiorari* and should be denied.

Respectfully submitted,

RICHARD A. KLEINE
Assistant General Counsel
MONSANTO COMPANY
800 N. Lindbergh Blvd.
St. Louis, MO 63167
(314) 694-3720

KENNETH A. LETZLER
Counsel of Record
JONATHAN I. GLEKLEN
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

JOHN M. JOHNSON
LIGHTFOOT, FRANKLIN,
& WHITE, L.L.C.
300 Financial Center
505 20th Street North
Birmingham, AL 35203
(205) 581-0700

Attorneys for Respondent

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

FLORIDA SEED COMPANY, INC., *et al.*,
Petitioners,

v.

MONSANTO COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONERS

CHARLES M. CROOK
JOHN F. MANDT *
PHILLIP A. NICHOLS
BALCH & BINGHAM LLP
P.O. Box 306
Birmingham, Alabama 35201
(205) 251-8100
Counsel for Petitioners Florida Seed Company, Inc. and Frit Industries, Inc.

* Counsel of Record

September 24, 1997

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REPLY BRIEF OF PETITIONERS

Petitioners Florida Seed Company, Inc. ("Florida Seed") and Frit Industries, Inc. ("Frit") hereby reply to the Brief in Opposition submitted by Respondent Monsanto Company ("Monsanto"). In their Petition and below, Petitioners alleged that Monsanto engaged in a pattern of unlawful, anticompetitive conduct designed to maintain or expand monopoly power [1] in the market for residential non-selective herbicides. For purposes of the present case, the critical step in Monsanto's pattern of illegal conduct centered on Monsanto's refusal to deal with Florida Seed as a distributor of a product that the Federal Trade Commission ("FTC") had required Monsanto to divest for competitive reasons.

In response to the Brief in Opposition, Petitioners submit that (i) they challenge the monopolization efforts of Monsanto and do not seek to challenge or unravel the Ortho acquisition; (ii) it is the power to raise prices above or reduce output below competitive levels which is the primary focus of the antitrust laws; (iii) the wooden approach to federal antitrust standing analysis utilized by the Eleventh Circuit in this case is contrary to established precedent of this Court and other circuit courts; (iv) distributors who are excluded from the market for anticompetitive purposes have standing to complain of violations of Section 2 of the Sherman Act; and (v) Petitioners are not precluded from pursuing a private right of action by the existence of an FTC consent decree.

If the opinion below is permitted to stand, a dangerous narrowing of the private right of action to bring federal antitrust claims will result. Without a full review and reversal by this Court, an entire class of private plaintiffs (distributors) will be foreclosed from pursuing federal antitrust claims if their injuries happen to follow a merger or acquisition by the defendant.

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[1] That is, the power to raise prices above or reduce output below competitive levels.

I. MONSANTO IMPROPERLY CASTS THE CASE AS A CHALLENGE TO A MERGER.

As it did in the court below, Monsanto paints this case as one involving a challenge to a merger rather than one involving a challenge to a refusal to deal as part of a scheme to monopolize the relevant market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The reasoning behind Monsanto's mischaracterization is simple; it perceives that the standing jurisprudence available to it under Section 7 of the Clayton Act is more favorable than the jurisprudence applying Section 2 of the Sherman Act. Unfortunately, Monsanto's mischaracterization was accepted by the court below.[2] As noted in the Petition, the Eleventh Circuit plainly viewed the case as a challenge to the Ortho acquisition, even though the court of appeals acknowledged that Petitioners did not appeal the district court's denial of standing under Section 7 of the Clayton Act. *Compare* Pet. App. A at 5a-6a (referring to "that which makes a merger unlawful") *with* Pet. App. A at 3a n.1 (acknowledging that denial of standing under Section 7 of the Clayton Act was not appealed).

The challenged conduct in this case is monopolization of the relevant market effectuated through Monsanto's emasculation of the distribution channels for the Kleenup product. As alleged in the Complaint, Monsanto disrupted the distribution of Kleenup, and its viability as a competitive product, by terminating certain distributors, like Florida Seed, that had the right to distribute only one brand of residential non-selective herbicide—Kleenup. R1-1-18, 19.[3] Monsanto's anticompetitive actions ensured that

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[2] Although it is of no consequence, it should be noted that Monsanto asserts in its Brief in Opposition ("Monsanto Brief") that "Judge Tjoflat wrote for a unanimous panel of the United States Court of Appeals for the Eleventh Circuit. . . ." Actually, the opinion was written by Judge Dubina.

[3] Citations to the record refer to the volume, the document number and the page of the record maintained by the district court clerk.

Kleenup would be at a competitive disadvantage to Monsanto's Roundup product. In short, the Complaint charges that Monsanto injured Florida Seed in order to injure competition itself.

Petitioners' monopolization claim sought no relief in respect of Monsanto's acquisition of Ortho—it neither sought to enjoin the acquisition nor sought damages in respect of it. Rather, Petitioners sought damages flowing from Florida Seed's exclusion from the market for "the manufacturing and formulation of non-selective herbicides as well as the *marketing and selling* of non-selective herbicide products for residential use. . . ." R1-1-2, 3 (emphasis added). In their zeal to fit this case into a body of "uniform precedent" under Section 7 of the Clayton Act, Monsanto and the lower court either misperceived or mischaracterized Petitioners' monopolization claim as one seeking to attack "an allegedly anti-competitive upstream merger." *See, e.g.*, Monsanto Brief at 15. The acquisition gave Monsanto the means to weaken the competing brand, but the monopolization claim at issue here challenges the anticompetitive scheme that resulted in Petitioners' exclusion from the market; Petitioners do not attack the acquisition itself.

II. MONSANTO IS WRONG IN SUGGESTING THAT AN ANTITRUST PLAINTIFF MUST SHOW AN ACTUAL INCREASE IN PRICE OR REDUCED OUTPUT.

Monsanto attempts to persuade this Court that an antitrust plaintiff must assert an actual increase in price or reduced output in order to have standing to bring a claim under Section 2 of the Sherman Act. Monsanto Brief at 4. Monsanto's narrow view directly contradicts the teachings of this Court. *See American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946) ("[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude

competition when it is desired to do so."); *see also, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 482-83 (1977).

According to Petitioners' Complaint, "[a]t all times relevant to this action, Monsanto has . . . possessed the power to control price and exclude competition in the relevant market." R1-1-10. Monsanto's assertions are not to the contrary. In fact, Monsanto boasts that had the FTC not stepped in, Monsanto would have destroyed completely the competition that existed between its Roundup product and Ortho's Kleenup. Monsanto Brief at 3. Of course, Monsanto's aspirations of withdrawing the availability of glyphosate, the crucial ingredient in most nonselective herbicides, did not come about and this case must be analyzed under the facts alleged in the Complaint, not a hypothetical account of different ways Monsanto might have flexed its competitive muscle.

III. MONSANTO URGES THIS COURT TO ADOPT A PER SE RULE OF ANTITRUST STANDING CONTRARY TO ESTABLISHED PRECEDENT, AND CITES DISTINGUISHABLE AUTHORITY TO SUPPORT ITS POSITION.

Monsanto would have this Court sanction a rule of law that former distributors who are terminated for any reason following a merger or acquisition always must be denied antitrust standing. Monsanto Brief at 7-10. Monsanto's reasoning is flawed for several reasons. Monsanto relies primarily on cases in which distributors challenged purportedly anticompetitive mergers themselves, not anticompetitive actions following the merger. None of the authorities cited by Monsanto relate to situations in which a defendant obtained temporary control over the product which served as its chief competitor. Thus, interbrand competition is implicated in this case in a way that was not present in any case cited by Monsanto. Monsanto has cited no authorities discussing the misuse of power over a temporarily-controlled product to destroy its distribution channels and thereby stifle competition. The effi-

ciency concerns that have driven most of the decisions cited by Monsanto simply are not applicable where a supplier is given a brief period of control over a product with which it must compete in the future.

The Court should note that Monsanto's brief is strangely silent with respect to Petitioners' discussion of the effect on this case of *Construction Aggregate Transp., Inc. v. Florida Rock Indus.*, 710 F.2d 752 (11th Cir. 1983). *See* Pet. at 16-17. Instead, Monsanto relies principally upon decisions that are readily distinguishable because they involved plaintiffs that were injured only derivatively, rather than directly. *See, e.g., G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762 (2d Cir.), *cert. denied*, 116 S.Ct. 381 (1995).[4] In *Honickman*, the Second Circuit considered the antitrust standing under Section 2 of the Sherman Act of distributors that lost their distributorships under circumstances much different from those presented here. The plaintiff distributors in *Honickman* contended that the defendant engineered a competing bottler's financial collapse so that the defendant could acquire that bottler's assets without igniting competitive concerns by the FTC, and the plaintiff distributors were injured because their distribution contracts disappeared when the bottler failed.

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[4] Monsanto also tries to make the decision in *Sierra Wine & Liquor Co. v. Heublein, Inc.*, 626 F.2d 129 (9th Cir. 1980) support its position by taking that court's holding out of context. Monsanto cites *Sierra Wine & Liquor* for the proposition that a terminated distributor asserting a monopolization claim can never have standing. Monsanto Brief at 18. In reality, that court determined that the plaintiff did not have standing because the plaintiff had failed to prove the existence of a combination in violation of the antitrust laws. *Id.* at 134. Because the plaintiff was not terminated by the manufacturer which purportedly had attempted to monopolize the relevant market, but another party which the plaintiff had failed to prove acted in concert with the manufacturer, the plaintiff failed to connect its injury to the monopolizing manufacturer. *Id.* In contrast, Florida Seed has alleged that Monsanto directly injured Florida Seed in its efforts to monopolize the relevant market.

According to the Second Circuit, the plaintiff distributors in *Honickman* lacked antitrust standing because they did not suffer antitrust injury. *Id.* at 766. The basis for the Second Circuit's decision was that the plaintiffs' injuries were merely derivative of the injuries suffered by the bottler. *Id.* According to the allegations of the plaintiffs in *Honickman*, the defendant directly waged its attack against its competitor in the bottling sector of the soft drink market. Therefore, the anticompetitive acts in *Honickman* were made directly against the bottler and the resulting harm to the plaintiff distributors was merely a byproduct of that attack on the bottler. *Id.* ("It follows naturally that a party in a business relationship with an entity that failed as a result of an antitrust violation has not suffered the antitrust injury necessary for antitrust standing.")

In this case, by contrast, the injuries sustained by Florida Seed were direct—Monsanto directed its anticompetitive conduct at Florida Seed in order to impair the Kleenup brand. Thus, Florida Seed's injuries were not merely a byproduct of competitive damage done to the Kleenup brand. Rather, those injuries were the means by which the Kleenup brand was weakened.

Moreover, the core anticompetitive actions complained of here occurred after Monsanto's acquisition of the Ortho assets but before the FTC's Consent Decree was carried out. Whereas the defendant in *Honickman* had achieved its monopoly by acquiring the competing bottler and could have been expected to look for the most efficient means of distribution, Monsanto, by virtue of the FTC's divestiture requirement, was in a position to tighten its monopoly position over residential non-selective herbicides by terminating effective and efficient distributors of its former and future competitor. The present situation is also distinguishable from *Honickman* because Monsanto has enjoyed and continues to enjoy patent protection on glyphosate, the key ingredient in the residential non-selective herbicides Roundup and Kleenup. *See* R1-1-3 to -6. This fact

gave Monsanto a degree of control unlike the defendant in *Honickman* because of the extremely high barriers to entry into the residential non-selective herbicide market. *See* R1-1-4 (¶ 10). Finally, the plaintiffs in *Honickman* distributed only the products of Honickman, whereas Florida Seed distributed a product (Kleenup) that was, and pursuant to the Consent Decree would continue to be, directly competitive with Monsanto's Roundup product.

IV. MONSANTO'S ATTEMPT TO DISCREDIT THE PRECEDENT CITED BY PETITIONERS IS UNAVAILING.

Monsanto is wrong when it suggests that the cases cited in the Petition support only the standing of a terminated distributor to complain of conspiracies under Section 1 of the Sherman Act. Monsanto Brief at 12-13. At best, Monsanto's distinction is one that makes no difference: why would a terminated distributor have standing to complain of a collateral anticompetitive scheme where a refusal to deal is concerted, but lack standing where a firm with monopoly power engages in exclusionary conduct to preserve or expand its market dominance? The cases discussed by Monsanto do not make Monsanto's distinction between Section 1 and Section 2 claims, and there is no sound basis to do so.[5]

Moreover, Monsanto's position is at odds with a line of authority from this Court dating back to *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (single seller's right to refuse to deal not unlimited). Indeed, one of the primary cases relied upon by Monsanto clearly supports

[5] Petitioner recognizes that standing under Section 7 of the Clayton Act may in fact be governed by a more restrictive standard that is based on the rationale "for condemning the merger." *See* Monsanto's Brief at 9-10 (quoting Professors Areeda & Hovenkamp). As noted previously, Petitioners do not seek to condemn the Ortho merger. Here, Florida Seed's exclusion from the market was the means by which output was restricted and the competing brand crippled. *See id.* (focusing on the means by which output is restricted).

Petitioners' position that a refusal to deal by a single supplier having a collateral anticompetitive purpose to monopolize a relevant market is actionable. *See Universal Brands, Inc. v. Philip Morris Inc.*, 546 F.2d 30, 33 (5th Cir. 1977) ("If the refusal to deal is a device used to acquire a monopoly . . . or to establish market dominance and drive out competition . . . it is illegal."). The *Universal Brands* language is especially applicable where, as here, the "driving out" of competition took the form of excluding efficient distributors of a competing brand.

In addition to overlooking these authorities, Monsanto makes the erroneous assertion that *General Indus. Corp. v. Hartz Mtn. Corp.*, 810 F.2d 795 (8th Cir. 1987), which supports Florida Seed's position,[6] only involved a claim under Section 1 of the Sherman Act. Monsanto Brief at 13. In fact, the decision in *Hartz* revolved primarily around an attempted monopolization claim under Section 2 of the Sherman Act. Monsanto's description of the case is, at best, incomplete.

V. FLORIDA SEED DOES NOT ATTEMPT TO ENFORCE THE FTC CONSENT DECREE AND THE CONSENT DECREE DOES NOT PRECLUDE PRIVATE ACTIONS AGAINST MONSANTO.

Monsanto urges that Florida Seed is not a proper party to bring an action against Monsanto because Monsanto had entered into a Consent Decree with the FTC, noting that consent decrees are not enforceable by private third parties. Monsanto Brief at 14-15. Again, Monsanto is wide of the mark. Florida Seed does not attempt to

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[6] In *Hartz*, the Eighth Circuit determined that a distributor that was terminated pursuant to attempted monopolization by its supplier because it distributed a competing brand could bring an antitrust action under Section 2 of the Sherman Act. *See id.* at 807 ("The jury could reasonably have concluded that in effectively preventing [competitive brand] products from reaching consumers, [the supplier] harmed both [the distributor] and the competition in the market.).

enforce the FTC Consent Decree and has never asserted as much.

It is without question that the entry of the Consent Decree between Monsanto and the FTC does not preclude a private action by a third party such as Florida Seed. It has been recognized that "the entry of [a] consent decree is not an adjudication on the merits that can give rise to issue preclusion. . . ." *United States v. Alex Brown & Sons, Inc.*, 169 F.R.D. 532, 540 n.4 (S.D. N.Y. 1996). Likewise, this Court has held that the United States may not be precluded from pursuing an action for antitrust violations even where the same actions were previously ruled upon in a private action. *United States v. Borden Co.*, 347 U.S. 514 (1954). As later confirmed by this Court, " 'private and public actions were designed to be cumulative, not mutually exclusive.' " *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961), *quoting Borden*, 347 U.S. at 518. As noted by this Court in each of the two decisions cited above, "[d]ifferent policy considerations govern [government suits and private suits]. They may proceed simultaneously or in disregard of each other." *Id.* (internal citations omitted). Opinions in the circuit courts have reached a similar conclusion. *See, e.g., I.A.M. National Pension Fund v. Industrial Gear Mfg. Co.*, 723 F.2d 944, 949 & n.7 (D.C. Cir. 1983) (consent decree not a basis for issue preclusion).

The authorities cited by Monsanto for the unremarkable proposition that a private party may not enforce an FTC consent decree do not preclude independent private antitrust actions based on post-acquisition misconduct. *See Federal Trade Comm'n. v. Owens-Corning Fiberglas Corp.*, 853 F.2d 458, 463 (6th Cir. 1988) ("We express no view as to whether [a private party] could have brought a private contract or tort action, or any other action, against the Trustee individually."); *Ambrook Enters. v. Time, Inc.*, 612 F.2d 604, 612-13 n.14 (2d Cir. 1979) (viewing consent decree as historical fact). To hold otherwise would be tantamount to declaring "open sea-

son" for anticompetitive behavior in the aftermath of a consent decree. In this instance, the Consent Decree is an historical fact that in no way operates to deny standing to Florida Seed. In any event, Florida Seed's Complaint refers to Monsanto's violation of the FTC order as part of the pattern or scheme of anticompetitive behavior engaged in by Monsanto to preserve its market dominance, not as a freestanding, actionable wrong.[7]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES M. CROOK
JOHN F. MANDT *
PHILLIP A. NICHOLS
BALCH & BINGHAM LLP
P.O. Box 306
Birmingham, Alabama 35201
(205) 251-8100
Counsel for Petitioners Florida Seed Company, Inc. and Frit Industries, Inc.

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* Counsel of Record

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[7] It is surprising that Monsanto finds support for its view in the FTC's recent civil penalty against a supermarket chain for failing to preserve the viability of assets pending divestiture. Monsanto's Brief at 15 n.8. The entire basis for Monsanto's Brief and the decision below is that Florida Seed's exclusion from the market entails no antitrust injury because it does not flow from that which makes defendant's acts unlawful. Why then would the FTC be concerned about the viability of distribution channels, brand names and the like pending divestiture as it apparently was both in the case of the Ortho acquisition and in the example cited by Monsanto? The FTC's action against Schnucks underscores the competitive threat associated with post-acquisition conduct aimed at unfairly impeding competition, and in so doing, underscores the error below.